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IN THE

Supreme Court of the United States

October Term 1962

No. [redacted] 194

NATALE EVOLA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

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NATALE EVOLA,

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—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR CERTIORARI

Petitioner, Natale Evola, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above case (*sub nom. United States* v. *Aviles,* 315 F. 2d 186) on March 8, 1963 (see *infra* as to the order below upon rehearing).

As further noted *infra* this petition is companion with those of several other petitioners who were appellants in the *Aviles* case, *supra,* in the Court below.

Citations to Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, printed in the Appendix hereto, *infra,* is reported at 315 F. 2d 186. Two relevant opinions of the United States District Court for the Southern District of New York, printed in the Appendix to, or otherwise supplied in connection with, the companion petition for cer-

tiorari which is being filed herein on behalf of petitioner Vito Genovese, are reported at 197 F. Supp. 596 and 200 F. Supp. 711. Another opinion of the United States Court of Appeals for the Second Circuit, which was rendered in connection with a prior stage of this matter and which led to prior petitions for certiorari (362 U. S. 974, 982, rehearing denied 363 U. S. 858), is reported at 274 F. 2d 179.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered March 8, 1963 (Appendix hereto, *infra*). A petition for rehearing, filed March 22, 1963, was denied by the Court of Appeals on April 10, 1963. By order of May 8, 1963 the Honorable John M. Harlan, Associate Justice of this Court, extended the time for filing a petition for a writ of certiorari on behalf of petitioner Evola to and including June 8, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Petitioner Evola adopts the respective "Questions Presented" in the companion petitions for certiorari which are being filed on behalf of other petitioners in this case, especially the "Questions Presented" in the petition of Vito Genovese. Supplementarily, petitioner Evola formulates the following questions:

1. Under the test enunciated by this Court in *Campbell v. United States*, No. 631, October Term, 1962, decided May 27, 1963, under other applicable decisions of this Court, and

under applicable statutory (18 U.S.C. § 3500) and constitutional (Fifth Amendment— due process of law) requirements, did the Court below err in redetermining *de novo* the factual questions which had been determined by District Judge Murphy in regard to the producibility under the Jencks Act of certain interview notes of Assistant United States Attorney Shaw, and in reversing Judge Murphy's conclusion that those notes were producible?

2. If it was error for the Court below to make the redetermination as to producibility mentioned in our preceding question, does not petitioner Evola stand fatally prejudiced by Judge Murphy's other determination (not reached for review by the Court below) that non-production of the Shaw interview notes which Judge Murphy had found producible was not prejudicial in that defendants' rights of cross-examination were not "unduly restricted" thereby? Did not this hitherto unreviewed ruling of non-prejudiciality misapply the test of harmless error laid down by this Court in *Rosenberg* v. *United States*, 360 U. S. 367, 370?

3. In the overall setting of the "Jencks Act" rulings of both Courts below with respect to the Shaw interview notes, does not this case present what Circuit Judge Charles E. Clark recently termed the "very evil which the Supreme Court has continually repudiated", namely, "that the speculation of the trial court is again being substituted for the judgment of defense counsel in assessing a statement's worth as an aid to cross-examination" (*United States* v. *Cardillo, et al.*, 2nd Cir., decided April 24, 1963, concurring op., slip opinion at pp. 3414-3415)?

Constitutional and Statutory Provisions Involved

The case involves the Due Process Clause of the Fifth Amendment of the Federal Constitution. It also involves 18 U.S.C. § 3500 (the "Jencks Act"), which we do not print herein because it is printed in the companion petition for certiorari on behalf of Vito Genovese.

Statement of the Case

(Our statement of the case in this petition is abbreviated because a full statement, which we hereby adopt, is presented in the petition of Vito Genovese. Except as otherwise indicated, all of our recitals of fact *infra*, are taken from the opinions of the Courts below which were cited *supra* under the heading "Citations to Opinions Below".)

Petitioner Evola and the other petitioners herein were convicted, after a three months' jury trial in the Southern District of New York, of conspiracy to violate Federal narcotic laws. Their convictions were affirmed by the Court below (274 F. 2d 179), and this Court denied certiorari (*Evola* v. *United States*, 362 U. S. 974, 982, rehearing denied, *Genovese* v. *United States*, 363 U. S. 858).

The aforementioned convictions occurred on April 17, 1959. On August 26, 1960, the within petitioners (including Evola) moved in the District Court for a new trial pursuant to Rule 33, F. R. Cr. P. The grounds of those motions for new trial were (as summarized in the opinion of the Court below on the judgment here sought to be reviewed—315 F. 2d at p. 188):

> "* * * (1) alleged recantations of trial testimony by the principal government witness, Nelson Cantel-

lops; (2) statements by Cantellops at the hearing on the motions for a new trial which were allegedly inconsistent with his original testimony; (3) allegedly new extrinsic evidence tending to establish Cantellops' perjury in his trial testimony concerning a certain trip to Las Vegas, Nevada; (4) alleged concealment at the trial of a rent record in the possession of the Government; (5) alleged post trial statements by Cantellops which tended to discredit his trial testimony; (6) alleged spoliation of notes of federal Narcotics Agents Rowan, Consoli and Muglia, in violation of the Jencks Act, 18 U.S.C. § 3500; and (7) failure of the Government to make available to the trial court certain interview notes of Assistant United States Attorney Donald H. Shaw, which notes were allegedly producible under the Jencks Act, 18 U.S.C. § 3500."

District Judge Bicks, who had presided at the original narcotics trial, conducted hearings upon the motions for new trial, and he denied those motions insofar as they rested upon grounds 1 through 6 as above quoted (197 F. Supp. 536). Judge Bicks reserved decision as to the above quoted ground no. 7—involving the Shaw interview notes—indicating that he intended to take further testimony on this issue. Judge Bicks becoming ill, such further testimony, which was to have been taken by *voir dire* examinations, was not taken before Judge Bicks. Instead, District Judge Murphy was assigned to the further conduct of the hearing and to make a determination as to the ground upon which Judge Bicks had reserved decision. Thereafter Judge Murphy denied the motions for a new trial (200 F. Supp. 711). On appeal to the United States Court of Appeals for the Second Circuit, Judge Bicks' rulings and

Judge Murphy's order denying the motions for a new trial were affirmed (315 F. 2d 186). The within several companion petitions for certiorari seek review of the last-mentioned judgment of affirmance.

We shall not burden the Court with factual recitals concerning the issues presented by the above quoted new trial grounds 1 through 6—as to which the Court below affirmed (315 F. 2d at p. 188) on the opinion of Judge Bicks (197 F. Supp. 536) without further discussion—because this aspect of the case is sufficiently treated in the companion petition of Vito Genovese. Although the Genovese petition likewise treats the above quoted ground no. 7—relating to the Shaw interview notes—we shall refer briefly herein to that part of the case.

As noted in the opinion below (315 F. 2d at p. 189), Judge Murphy had separated the Shaw material into three groups, the second and third of which are referred to as follows in the opinion below (*ibid*):

> "(2) Materials which were 'probably Jencks' statements.' Judge Murphy ruled that the nonproduction of this second group of materials, into which was placed 'the great majority' of Shaw's original interview notes, was nonprejudicial to appellants on the ground that 'virtually the [ir] entire contents' 'correspond[ed] with the grand jury testimony of Cantellops which was turned over to the defense.'
>
> (3) Notes which 'most assuredly should have been produced pursuant to § 3500.' This group consisted of handwritten interview notes dated October 10 and 11, 1957. Although these notes contained new impeaching information not otherwise available to appellants, Judge Murphy ruled that nonproduction of

these notes did not prejudice defendants' interests in that defendants' cross-examination of Cantellops was not 'unduly restricted' thereby:

> '* * * this witness was subjected to a most complete and searching cross-examination by able and experienced counsel during a period of 14 trial days, in the course of which his character and credibility were thoroughly explored and devastatingly attacked. The facts of his considerable prior criminal activities, his affliction with a loathsome disease, his immorality, his perjuries and his motive to misrepresent were all paraded before the jury without quarter. To be able with the use of the October notes to show that Cantellops spoke untruthfully on yet another occasion * * * would simply add umber to an already blackened witness.' 200 F. Supp. at 717."

In the appeal below it was contended on the part of the within petitioners (including Evola) that, as regards the portion of the Shaw materials which Judge Murphy found "probably Jencks statements" but "virtually" consistent with the Grand Jury testimony, numerous discrepancies did in fact exist between the Shaw notes and the Grand Jury minutes (Brief in the Court below on behalf of Vito Genovese at pp. 65-97); and as to the portion of the Shaw materials which Judge Murphy found "most assuredly should have been produced" but whose non-production he found non-prejudicial, the within petitioners urged in the Court below that Judge Murphy had misapplied the test of harmless error laid down in *Rosenberg* v. *United States*, 360 U. S. 367, 370 (Brief of Genovese just cited, pp. 15-59).

The Court below did not reach the question of the consistency of the "probably" producible Shaw materials with

the Grand Jury testimony, nor did it reach the question of the prejudicial effect of non-production of the "most assuredly" producible items, because, instead, the Court below resolved the issues of the appeal in regard to the Shaw materials by arriving at a *de novo* finding of its own to the effect that neither the Shaw materials which Judge Murphy had deemed "probably" producible nor those which he had deemed "most assuredly" producible were actually producible at all under the Jencks Act. In support of this conclusion, the Court below stated (315 F. 2d at p. 191—footnote omitted):

> "In ruling that the October 10 and 11 notes were Jencks 'statements,' and that the great majority of Shaw's other original interview notes were probably 'verbatim recitals' within the Act's definition, Judge Murphy relied solely upon the notes themselves and upon the record of Shaw's earlier testimony before Judge Bicks. Judge Murphy conducted no voir dire examination of Shaw and received no testimony from any other witness prior to ruling upon this portion of appellants' motions. As we have available to us all of the materials upon which Judge Murphy based his rulings, our conclusion with respect to this factual issue is entitled to no less weight than that of the Court below."

Having thus determined that its powers of review allowed it to make independent findings on the issue of producibility, the Court below went on in its opinion herein to conclude that the Shaw materials were not "a substantially verbatim recital" because, *inter alia,* Cantellops' speech was difficult to understand and transcribe, the Shaw notes were not read back to Cantellops, Cantellops never signed nor initialed them, some of the notes did not deal solely

with Cantellops' statements, Mr. Shaw's practice had been to edit and add to the notes, and Mr. Shaw had been selective in his note-taking (315 F. 2d at pp. 191-192).

The importance, to petitioner Evola, of the opportunity which would have been afforded at the narcotics trial to adduce further impeachment of the credibility of Cantellops with the aid of the Jencks Act materials held nonproducible by the Court below and non-prejudicial by Judge Murphy (who, however, as seen, had held them producible), may be gathered from various statements in the two opinions written by the Court below in this case (274 F. 2d 179 and 315 F. 2d 186), where Cantellops' central and principal role as the Government's indispensable accusing witness, as well as his base credibility, are repeatedly noted. And, we respectfully emphasize, it is undisputed that, except for the testimony of the basely discredited accomplice witness Cantellops, there is not so much as a scintilla of evidence inculpating the petitioner Evola under this single-count conspiracy indictment.

Reasons for Granting the Writ

1. The case is a compelling one for the exercise of this Court's power of supervisory administration of the Jencks Act procedures. Had the rulings below gone no farther than they were carried in Judge Murphy's determinations —i.e., had the case below stopped with the determination that non-production of the producible materials was not prejudicial—the case would be a compelling one for certiorari simply on the basis that it is for defense counsel, not for a trial court, to evaluate what is tactically useful for the defense in Jencks Act producible materials. *Scales*

v. *United States,* 367 U. S. 203, 258; *Palermo* v. *United States,* 360 U. S. 343, 346; *Jencks* v. *United States,* 353 U. S. 657, 668-669.

However, the case below has not stopped with merely those rulings as to *non-prejudiciality.* The case below has gone onward, in the forum immediately below, to develop also a ruling and a doctrine of *non-producibility* which strongly enhances the need for certiorari. The undertaking by the Court below to make a *de novo* determination as to producibility seems difficult to reconcile with this Court's decision in *Campbell* v. *United States,* no. 631, October term 1962, decided May 27, 1963, where the Court, in referring to certain of the issues of producibility in that case, said: "We think these questions properly are ones of fact, the determination of which by the district judge may not be disturbed unless clearly erroneous". We do not read this Court's language in the aforementioned second *Campbell* decision as contemplating any different or larger measure of appellate review of a trial court's finding of producibility where the trial judge dealt with a written record rather than oral testimony. On the contrary, this Court's language in *Campbell II* denotes that what essentially counts in this area is, precisely, the factor of the location of the trial or *nisi prius* judge in the place which he occupies in the judicial hierarchy—see the Court's reference (quoting from the *Palermo* case, *supra*) to "the good sense and experience of the district judge" and "the appropriately limited review of appellate courts"; see also the Court's reference (again, in *Campbell II,* quoting partially from *Palermo*) to the need for the trial judge's "*ad hoc* appraisal of one of the 'myriad * * * possible permutations of fact and circumstance' * * *

present in such cases''; and finally, see this Court's additional language from *Campbell II* where it noted how these determinations of Jencks Act producibility concern ''a subject, rulings on evidence, which is peculiarly the province of trial courts''. This last, in particular, would obviously not be affected by the circumstance of the trial judge's having dealt with a written record rather than the testimony of witnesses who appeared before him on the stand.

Very recently Circuit Judge Charles E. Clark, concurring in *United States* v. *Cardillo, et al.*, 2nd Cir., decided April 24, 1963, spoke words which have a remarkable aptness for the instant situation and which contain a remarkable summons for this Court to intercede in a certain class of Jencks Act cases of which the instant case, we submit, is a prime example (we quote from pp. 3414-3415 of the printed slip opinion in the *Cardillo* case *supra*):

> ''CLARK, *Circuit Judge* (concurring in the result):
>
> We seem generally unwilling to upset convictions when the Jencks Act, 18 U. S. C. § 3500, has not been scrupulously observed by the prosecution and the trial court. This tendency is disturbing. Several doctrinal devices have been developed to this end, such as that enunciated in *United States* v. *Annunziato*, 2 Cir., 293 F. 2d 373, 382, cert. denied *Annunziato* v. *United States*, 368 U. S. 919, that is only ''harmless error'' not to produce a statement which appears to ''corroborate'' a witness's testimony, or in *United States* v. *Simmons*, 2 Cir., 281 F. 2d 354, 357-358, and the present case that the defense is not entitled to statements relating to purely incidental or collateral aspects of a witness's testimony, or in *United States* v. *Aviles*, 2 Cir., March 8, 1963, that the defense is not entitled to statements not suffi-

> ciently exact, though to the district judge "probably verbatim," recitals of the witness's oral statements. By employing one or more of these doctrinal devices the court is enabled to affirm an appealed conviction. Nevertheless this means that the speculation of the trial court is again being substituted for the judgment of defense counsel in assessing a statement's worth as an aid to cross-examination. It is this very evil which the Supreme Court has continually repudiated. See *Scales* v. *United States*, 367 U. S. 203, 258; *Palermo* v. *United States*, 360 U. S. 343, 346; *Jencks* v. *United States*, 353 U. S. 657, 668-669. But these doctrinal devices for achieving affirmance in the face of Jencks Act noncompliances are sufficiently entrenched that exception should not be made in individual cases and correction must come from the Supreme Court. Thus I reluctantly concur in the affirmances here noted. * * *."

2. Further as to the question of prejudice caused to the defense by non-production of the Shaw interview notes—on which District Judge Murphy ruled that there was no prejudice and on which the Court below found it unnecessary to rule because it deemed the items not producible at all—we refrain from re-threshing the presentation on this subject which is contained in the companion petition of Vito Genovese, but we respectfully call the Court's attention to the language of the Court of Appeals of the State of New York (opinion by Fuld, J.) in the well-known case in which that Court enunciated the equivalent of the Jencks rule for New York State criminal proceedings (*People* v. *Rosario*, 9 N. Y. 2d 286, 290, 213 N. Y. S. 2d 448, 451):

> "Furthermore, omissions, contrasts and even contradictions, vital perhaps, for discrediting a witness,

> are certainly not as apparent to the impartial presiding judge as to single-minded counsel for the accused; the latter is in a far better position to appraise the value of a witness' pretrial statements for impeachment purposes. Until his attorney has an opportunity to see the statement, it is asked, how can he effectively answer the trial judge's assertion that it contains nothing at variance with the testimony given or, at least, useful to him in his attempt to discredit such witness?
>
> "It is true that defense counsel will undoubtedly be in a position to cross examine at greater length than without such pretrial statements. But there is nothing wrong in this. * * *."*

3. Petitioner Evola respectfully adopts all of the reasons for the granting of certiorari which are presented in the companion petitions, particularly the petition of Vito Genovese.

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* It is true that the Court went on, in the *Rosario* case, *supra*, to hold that non-production of the materials which were held producible had not prejudiced the defendant because "On the record before us, there can be no possible question of the appellant's guilt, even apart from the testimony of the witnesses whose statements had been requested and refused. Not only was there evidence of admission to friends before and after the fatal robbery, not only was there proof of a confession to the district attorney, not only was there evidence of flight, but there was ballistics testimony indicating that the lethal bullet had issued from the appellant's gun. And, of the utmost significance, examination of the prior statements discloses that the few variances contained in them were of a most inconsequential character." As earlier herein noted, the question of petitioner Evola's guilt depended *solely* on the testimony of the execrable Cantellops.

CONCLUSION

For all of the reasons set forth in this petition and in the companion petitions it is respectfully submitted that a writ of certiorari should be granted.

Respectfully submitted,

MAURICE EDELBAUM,
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Natale Evola
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[Appendices follow]

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit on judgment sought to be reviewed (as printed in 315 F. 2d 186).

UNITED STATES OF AMERICA,
Appellee,

v.

ALFREDO AVILES et al.,
Defendants-Appellants.

No. 66, DOCKET 27377.

United States Court of Appeals
Second Circuit.

Argued Dec. 18, 1962.

Decided March 8, 1963.

• • • • •

Roy L. Reardon, New York City, for appellant Barcellona.

Albert J. Krieger, New York City, for appellants Joseph Di Palermo, and Charles Di Palermo.

Maurice Edelbaum, New York City, for appellant Evola.

Edward Bennett Williams, Robert L. Weinberg, Washington, D. C.; Wilfred L. Davis, New York City, for appellant Genovese.

Wilfred L. Davis, New York City, for appellant Gigante.

Henry K. Chapman, New York City, for appellants Nicholas Lessa and Rocco Mazzi.

Appendix A—Opinion of the United States Court of Appeals

Allen S. Stim, New York City, for appellant Ralph Polizzano.

Herbert S. Siegal, for appellant Santora.

Vincent L. Broderick, U. S. Atty., Southern District of New York (Arnold N. Enker, Arthur I. Rosett, Richard A. Givens, Asst. U. S. Attys., of counsel), for appellee.

Before WATERMAN, MOORE, and MARSHALL, Circuit Judges.

WATERMAN, Circuit Judge.

After a three months' jury trial in the Southern District of New York, appellants were convicted, on April 17, 1959, of conspiracy to violate federal narcotic laws, 21 U.S.C. §§ 173, 174. Their convictions were affirmed on appeal to this court, 274 F.2d 179, and the Supreme Court denied certiorari, Evola v. United States, 362 U.S. 974, 982, 80 S.Ct. 1057, 1058, 1059, 1068, 1071, 1073, 4 L.Ed.2d 1009, 1010, 1015, 1016, rehearing denied, Genovese v. United States, 363 U.S. 858, 80 S.Ct. 1610, 4 L.Ed.2d 1739.

On August 26, 1960, appellants moved in the district court for a new trial, Rule 33, Fed.R.Crim.P., and put forth, as grounds for their motions; (1) alleged recantations of trial testimony by the principal government witness, Nelson Cantellops; (2) statements by Cantellops at the hearing on the motions for a new trial which were allegedly inconsistent with his original testimony; (3) allegedly new extrinsic evidence tending to establish Cantellops' perjury in his trial testimony concerning a certain trip to Las Vegas, Nevada;

(4) alleged concealment at the trial of a rent record in the possession of the Government; (5) alleged post trial statements by Cantellops which tended to discredit his trial testimony; (6) alleged spoliation of notes of federal Narcotics Agents Rowan, Consoli, and Muglia, in violation of the Jencks Act, 18 U.S.C. § 3500; and (7) failure of the Government to make available to the trial court certain interview notes of Assistant United States Attorney Donald H. Shaw, which notes were allegedly producible under the Jencks Act, 18 U.S.C. § 3500.

After extended hearings, Judge Bicks, who had presided at the original trial, denied appellants' motions insofar as they rested upon grounds 1 through 6 set forth above. 197 F.Supp. 536. He reserved decision with respect to the Shaw interview notes, indicating his intention to take further testimony regarding this issue. Due to the illness of Judge Bicks, however, the contemplated voir dire examination was not held. Judge Murphy was subsequently assigned to conduct the hearing and make a determination as to the ground upon which Judge Bicks had reserved decision. On December 22, 1961, Judge Murphy denied the motions for a new trial. 200 F.Supp. 711.

From these orders below adverse to them appellants now prosecute this consolidated appeal claiming that the grounds set forth above are individually and collectively sufficient to entitle them to a new trial under Rule 33, Fed.R. Crim.P. As to the grounds 1 through 6 set forth above, we affirm the order below on the careful opinion of

Judge Bicks. As to the Shaw interview notes, we affirm the order of denial below for the reasons set forth hereafter.

During the course of the original trial, defense counsel inquired, following the direct examination of the Government's principal witness, Nelson Cantellops, whether the United States Attorney had in his possession

> "any report or memorandum prepared by a government agent concerning any interview that was conducted with [Cantellops] at any time, under the Jencks decision and under 3500."

The Government subsequently made available to the court what were represented to be "the complete files of the Bureau of Narcotics" on Nelson Cantellops. No interview notes of Assistant United States Attorney Shaw were included in these materials, and, despite the fact that prior testimony indicated extensive questioning of Cantellops by Shaw, defense counsel made no further request for, nor objection to the non-production of, any Shaw notes still in existence.

Specific requests and objections relative to the Shaw notes were not made by counsel for appellants until the hearings below on the motions for a new trial. During the course of these hearings Shaw himself testified concerning notes he had taken of some 20 to 30 interviews with Cantellops, and of a "chronological statement of facts," prepared from these notes and other sources, concerning Cantellops' involvement in the alleged conspiracy.

Appendix A—Opinion of the United States Court of Appeals

Upon demand by counsel for appellants, the Government produced for Judge Murphy's *in camera* inspection two envelopes labeled, respectively, "Former Assistant U. S. Attorney Shaw's Chronology" and "Original Notes and Assorted Miscellany of Former Assistant U. S. Attorney Shaw."

In ruling on appellants' motions, Judge Murphy separated the Shaw materials into three groups:

(1) Materials which were not "substantially verbatim recitals" of Cantellops' statements. Into this group were placed Shaw's "chronology of facts," together with certain of Shaw's "original notes and assorted miscellany." Ruling that these materials would not have been found producible under 18 U.S.C. § 3500 had they been made available for the court's inspection during the original trial, Judge Murphy concluded that their nonproduction was not prejudicial to appellants' interests. See Rosenberg v. United States, 360 U.S. 367, 370, 79 S.Ct. 1231, 3 L.Ed.2d 1304 (1959). We cannot say that Judge Murphy's findings with respect to these materials were erroneous.

(2) Materials which were "probably Jencks' statements." Judge Murphy ruled that the nonproduction of this second group of materials, into which was placed "the great majority" of Shaw's original interview notes, was nonprejudicial to appellants on the ground that "virtually the[ir] entire contents" "correspond[ed] with the grand jury testimony of Cantellops which was turned over to the defense."

(3) Notes which "most assuredly should have been produced pursuant to § 3500." This group consisted of handwritten interview notes dated October 10 and 11, 1957. Although these notes contained new impeaching information not otherwise available to appellants, Judge Murphy ruled that nonproduction of these notes did not prejudice defendants' interests, in that defendants' cross-examination of Cantellops was not "unduly restricted" thereby:

> "* * * this witness was subjected to a most complete and searching cross-examination by able and experienced counsel during a period of 14 trial days, in the course of which his character and credibility were thoroughly explored and devastatingly attacked. The facts of his considerable prior criminal activities, his affliction with a loathsome disease, his immorality, his perjuries and his motive to misrepresent were all paraded before the jury without quarter. To be able with the use of the October notes to show that Cantellops spoke untruthfully on yet another occasion * * * would simply add umber to an already blackened witness." 200 F.Supp. at 717.

Appellants now vigorously contend that in so ruling with respect to the second two groups of Shaw materials, Judge Murphy misapplied the test of harmless error laid down in Rosenberg v. United States, supra, and United States v. Consolidated Laundries Corp., 291 F.2d 563 (2 Cir., 1961).

The Government argues, for its part, as it did below, first, that appellants waived all right to object to the nonproduction of the Shaw materials by their failure to demand these materials by their failure to demand these materials, or to

object to their nonproduction, at trial; second, that the materials constituted an attorney's work product, and as such were not producible under 18 U.S.C. § 3500; third, that the materials were neither statements of a witness, nor substantially verbatim recitals of such statements, and, for this reason, were not producible under the Jencks Act, 18 U.S.C. § 3500.

Because of our disposition of the Government's contentions, we do not reach the issue of harmless error from which appellants direct their major attack upon the order of Judge Murphy below.

We consider, first, the Government's suggestion that appellants are precluded from objecting to the nonproduction of the Shaw materials by failure properly to demand the materials, or to object to their nonproduction, at trial.

After the direct examination of Nelson Cantellops at the original trial, defense counsel asked, as indicated above, whether the United States Attorney had in his possession

> "any report or memorandum prepared by a government agent concerning any interview that was conducted with this witness at any time, under the Jencks decision and under 3500."

The court thereupon directed that "any such statement" be made available to counsel.

Counsel for the Government subsequently stated in open court:

> "The United States Attorney's office has examined all the reports in this case and we find that there is

no report which would fall within the ambit of Section 3500 and therefore need not be turned over to defense counsel."

When the court asked whether there was "any report whatever" that dealt with Nelson Cantellops, government counsel responded affirmatively, and Judge Bicks declared that he would examine those reports to determine whether they fell within Section 3500.

The Government now argues that defense counsel's request for "any report or memorandum prepared by a government agent" encompassed only reports of "Agents" of the Bureau of Narcotics, and not those of Assistant United States Attorneys, who, it is sought to have us believe, are not "government agents." Even if Shaw's materials were producible under the Jencks Act, the Government contends that, by their failure to make a timely demand, appellants are precluded from raising the issue upon this motion for a new trial.

Ours is an adversary system of criminal justice. It is not, however, a "game of verbal jackstraws," the object of which is to see whether the actions of either the Government or the defense can be pulled out from under the language of applicable statutes, the demands of opposing counsel, or the orders of the court, without disturbing any of the latter. Cf. Llewellyn, Jurisprudence 445 (1962). By enacting the Jencks Statute, 18 U.S.C. § 3500, Congress provided criminal defendants with a sharply circumscribed, but nonetheless important, right to obtain information from

the prosecution in criminal proceedings. To utilize that right, defense counsel must proceed with unusual diligence. Counsel is entitled to no statements of a government witness until the witness has testified on direct examination, yet the statement is unlikely to be of value unless it is secured and studied by counsel prior to cross-examination. Counsel must often frame requests under the Act with little or no information concerning the circumstances under which, or the agents to whom, the witness may have given producible statements. Moreover, defense counsel ordinarily has no basis upon which to object to government nonproduction of requested statements where unspecified materials are retained by the court following *in camera* inspection.

To these impediments to an effective invocation of Jencks Act rights by defendants in criminal cases the Government would now add the niceties of ancient common law pleading in the formulation of demands for producible statements. Of course the Act does not require that demands for statements must be of precise nicety, and we are unwilling to hold that such requests be couched in formal or technical language.

The Government further argues that the Shaw materials were the work product of an attorney and as such were not producible under 18 U.S.C. § 3500. In so arguing, the Government relies principally upon Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947) and the public policy reflected therein. Hickman v. Taylor, however, was

concerned solely with discovery in civil proceedings. The obtaining of statements of witnesses in the hands of the prosecution which the defense may use for impeachment purposes in criminal trials is made possible by the Jencks Act. That act makes no distinction among statements on the basis of the purpose for which they were recorded or the type of government agent to whom they were made. Saunders v. United States, —— F.2d —— (D.C.Cir.1963).

We are brought, finally, to the Government's contention, vigorously argued below and renewed on this appeal, that the Shaw interview notes were not "substantially verbatim recitals" of statements by Nelson Cantellops, and thus were not producible under the Jencks Act. If the Government's contention be upheld on this point, it follows that appellants' motions for a new trial were properly denied, insofar as they rested upon nonproduction of the Shaw materials. Appellants cannot have been prejudiced by the nonproduction of materials which, even had they been disclosed to the trial court for *in camera* inspection, would not have been found producible for defendants' use under the Act.

In ruling that the October 10 and 11 notes were Jencks "statements," and that the great majority of Shaw's other original interview notes were probably "verbatim recitals" within the Act's definition, Judge Murphy relied solely upon the notes themselves and upon the record of Shaw's earlier testimony before Judge Bicks. Judge Murphy conducted no voir dire examination of Shaw and received no testimony from any other witness prior to ruling upon this

portion of appellants' motions.[1] As we have available to us all of the materials upon which Judge Murphy based his rulings, our conclusion with respect to this factual issue is entitled to no less weight than that of the Court below.

In determining whether the Shaw notes were "statements" within the Jencks Act definition of that term, 18 U.S.C. § 3500(e), the cases provide certain well-defined criteria to assist us. Such a statement must, of course, be "a substantially verbatim recital of an oral statement made by [the] witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." 18 U.S.C. § 3500 (e) (2). The statement must fairly be "the witness' own words." Palermo v. United States, 360 U.S. 343, 352, 79 S.Ct. 1217, 3 L.Ed.2d 1287 (1959). It must "reflect fully and without distortion what had been said to the government agent." Ibid. The distortion which Congress sought to avoid by its narrowly-drawn definition "can be a product of selectivity as well as the conscious or inadvertent infusion of the recorder's opinions or impressions." Thus, "a report which merely selects portions, albeit accurately, from a lengthy oral recital" will not be producible under the Act. Ibid.

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1. Judge Murphy was not, of course, required to conduct a voir dire examination of Shaw, or to hold any hearing whatever, before determining whether these disputed documents were within the Jencks Act. As the Supreme Court said in Palermo v. United States, 360 U.S. 343, 354-355, 79 S.Ct. 1217, 1226, 3 L. Ed.2d 1287 (1959), it is "the function of the trial judge to decide, in light of the circumstances of each case, what, if any, evidence extrinsic to the statement itself may or must be offered to prove the nature of the statement."

In applying these criteria to the Shaw interview notes, we may consider, as did Judge Murphy, the general tenor of the notes themselves, Shaw's extensive testimony before Judge Bicks concerning the interviews and notes, and Shaw's affidavit, submitted to Judge Murphy in support of the Government's motion for reargument below and properly part of the record on this appeal.

Shaw testified at the post-trial hearing before Judge Bicks that he met with Cantellops 20 or 30 times over the course of almost a year. He testified that Cantellops spoke rapidly and in poor English, requiring that he "almost translate it and put it into a more recognizable form of English".[2] He stated that the notes were never read back to Cantellops, that Cantellops never signed or initialed them, and that only about one half of the notes contained information elicited from Cantellops, the remainder containing information coming from "close to a dozen different sources." Finally, Shaw testified that it was his practice to go over the notes after the interview and make additions to them, as the notes were taken not for the purpose of providing a record of Cantellops' testimony, but to assist Shaw in drafting the chronological statement and to serve as a guide in interrogating Cantellops before the grand jury.

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2. This testimony is supported by the testimony of Narcotics Agent Rowan before Judge Bicks that it was "impossible" for him to keep up with Cantellops' statements in his note-taking, and that Cantellops spoke rapidly, in bad English, ungrammatically and indistinctly. Judge Bicks, himself, relying on his familiarity with Cantellops' testimony during the trial, indicates agreement with this characterization of Cantellops' speech habits. 197 F.Supp. at 557.

Appendix A—Opinion of the United States Court of Appeals

Shaw's affidavit, submitted to Judge Murphy in support of the Government's motion for reargument, substantiates the foregoing, and adds that Shaw was selective in his note-taking and did not record the testimony that he thought was "incoherent, illogical or in conflict with what the assistant then knew to be the fact from other witnesses."

Finally, the documents themselves indicate that they are the result of a process of selection. They are not as voluminous as they would be if they were complete transcriptions of Shaw's 20 to 30 interviews with Cantellops. Further, the signs of addition and interpolation are evident on the face of the documents.

We hold, consequently, that the Shaw materials contained no statements which, had they been delivered to the trial court for *in camera* inspection, would have been found to be producible under the Jencks Act.[3] The orders of Judge Bicks and Judge Murphy, denying appellants' motions for a new trial, are, affirmed.

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3. Our conclusion in this respect should not be read as a condonation of the Government's failure to deliver the Shaw materials to the trial court for *in camera* inspection. See Judge Murphy's discussion, 200 F.Supp. at 714. In Palermo v. United States, 360 U.S. 343, 354, 79 S.Ct. 1217, 1225, 3 L.Ed.2d 1287 (1959), the Supreme Court laid down the rule that even before that time was the practice in this circuit: "When it is doubtful whether the production of a particular statement is compelled by the statute, we approve the practice of having the Government submit the statement to the trial judge for an *in camera* determination. Indeed, any other procedure would be destructive of the statutory purpose."

APPENDIX B

Judgment sought to be reviewed.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of March one thousand nine hundred and sixty-three.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. THURGOOD MARSHALL,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALFREDO AVILES, et al.,

Defendants,

CHARLES BARCELONA, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

Appendix B—Judgment sought to be reviewed

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are affirmed.

A. Daniel Fusaro
Clerk

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IN THE

Supreme Court of the United States

October Term 1962

No. [redacted] 1951

SALVATORE SANTORA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HERBERT S. SIEGAL,
Attorney for Petitioner.

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Cases Cited

Petitioner respectfully incorporates by reference on his behalf all the cases cited in the petition of Vito Genovese who has filed a petition for similar relief as though fully set forth herein without restatement of the same.

IN THE

Supreme Court of the United States

October Term 1962

No. .....

SALVATORE SANTORA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to issue a writ of certiorari to review the final judgment of the Court of Appeals for the Second Circuit which affirmed the orders of the United States District Court for the Southern District of New York denying petitioner's motion for a new trial on newly discovered evidence.

The Opinion Below

The opinion of the Court of Appeals is reported in 315 F. 2d 186.

The Grounds of Jurisdiction

(i) The judgment sought to be reviewed was dated and entered on March 8, 1963 and a petition for rehearing filed on March 22, 1963 was denied on April 10, 1963 and on May 6, 1963, Mr. Justice Harlan signed an order extending petitioner's time to file a petition for a Writ of Certiorari to and including June 8, 1963.

(ii) Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented for Review

The petitioner Salvatore Santora and the petitioner Vito Genovese were defendants in the same trial, both are involved in the proceedings herein and are seeking review of the same judgment and opinion of the Court of Appeals. The issues are substantially the same and the petitioner respectfully incorporates by reference on his behalf all the questions presented for review in the petition of Vito Genovese who has filed a petition for similar relief as though fully set forth herein without restatement of the same.

Constitutional Provisions

Petitioner respectfully incorporates by reference on his behalf all the constitutional provisions set forth in the petition of Vito Genovese who has filed a petition for similar relief as though fully set forth herein without restatement of the same.

Statutes Involved

Petitioner respectfully incorporates by reference on his behalf all the statutes involved set forth in the petition of Vito Genovese who has filed a petition for similar relief as though fully set forth herein without restatement of the same.

Statement of the Case

Upwards of a dozen persons were charged with conspiracy to violate the narcotic laws, 21 U.S.C., Sec. 173, 174. The indictment charged that the conspiracy continued from February 1, 1955 to July 7, 1958. The petitioner and fourteen defendants were convicted and petitioner was sentenced to twenty years.

All of the convictions with the exception of the defendant Rodriguez were affirmed by the Court of Appeals in U. S. against Aviles, 274 F. 2d 179, decided January 12, 1960. The Supreme Court denied certiorari on May 16, 1960, 362 U. S. 974, 982, and denied rehearing on June 20, 1960, 363 U. S. 858.

Following denial of certiorari and of rehearing petitioner's motion for a new trial was filed in the United States District Court, Southern District of New York which motions were predicated upon post trial recantations by the witness Cantellops and upon the perjurious testimony of Cantellops at the trial. Hearings on petitioner's motions were commenced before Judge Bicks and following the taking of testimony the motions for new trials were amended with leave of Court to allege deprivation of petitioner's rights under the Jencks Act, 18 U.S.C. Sec. 3500. Thereafter testimony was again taken and on May 5, 1961 Judge

Bicks filed an order denying in part and reserving decision in part upon the motions for new trials. Thereafter due to the illness of Judge Bicks, Judge Murphy was assigned by order of August 8, 1961 pursuant to Rule 25 F.R. Crim. P. to conduct "the hearing and determination of that part of the motion made by the petitioners upon which Judge Bicks had reserved decision". Thereafter on December 22, 1961, Judge Murphy rendered an opinion and order denying petitioner's motions for a new trial.

Thereafter consolidated appeals were taken to the United States Court of Appeals for the Second Circuit and on March 8, 1963 the United States Court of Appeals affirmed the orders of Judge Bicks and Judge Murphy, denying petitioners' motions for a new trial.

The only evidence purporting to link petitioner with this conspiracy was given by an informer and jailbird, one Cantellops. While he gave testimony covering the period March 1955 to May 1957, he referred to petitioner only on a few days in August, 1956. Cantellops testified to numerous meetings of others at which questions of policy were said to have been discussed, but said that petitioner Santora was not at any of them (S.M. 1382, 1383, 3476-3485). The entire evidence relating to Santora is set forth in his appendix below (pp. 6a-12a).

The testimony against Santora was based on the uncorroborated testimony of the accomplice, Cantellops; as follows:

1. A meeting in the Mexican's hotel room.
2. Two meetings in a park.
3. A trip to Philadelphia.

"NELSON SILVA CANTELLOPS

Direct examination:

(S1) Q. After the Cleveland trip, did you have occasion to make another trip? A. Yes, I make another trip.

Q. Where was that trip? Do you recall? A. It was to Miami.

Q. When as best you can recall did this Miami trip take place? A. At the beginning of August.

Q. Of which year? A. 1956.

• • •

Q. Were you picked up that night? A. Yes.

Q. Who picked you up? A. Ormento and another person.

Q. Who was the other person? Do you know? A. I never know. It was a Mexican; Mexico.

Q. Were you introduced to him? A. Yes.

Q. How were you introduced to him? A. He gave me the last name, but usually in this introducing we call each other by our nationalities.

Q. What did you call this one? A. Mexico.

Q. Had you seen him before? A. Never before.

• • •

(S6) Q. All right. When Ormento came back and talked to you then what happened? A. We went back to the Mexican's hotel.

Q. And what did you do when you got up to the hotel room? A. We went up in there and over there was the Mexican and another man.

References to the appendix of Santora on the appeal from his conviction will be designated S.

References to the appendix of this hearing are references to the appendix filed herein by appellant, Genovese, and will be designated G.

Q. Do you see that other man in this Courtroom? Will you stand up and take a look? A. The third man in the back over there.

• • •

Mr. Christy: May the record indicate that the witness has identified the defendant Santora.

Q. Were you introduced to this man? A. Yes.

Q. How were you introduced to him? A. As Tom.

Q. Tom what? A. Later I learned they call him Tom Mix.

Q. Did you hear him addressed as Tom Mix? A. Yes.

Q. And that is this man you just identified as Santora, is that correct? A. Yes.

Q. Did you have a conversation when you got up to the hotel room? A. Yes, the conversation of the trip took place again.

Q. What trip is this? A. The trip that they wanted me to make to Mexico.

Q. And what was said if you can recall? A. I refuse again.

Mr. Stim: Your Honor, may we have by whom.

(S7) Q. And by whom, as best you can recall. A. Everybody was taking part in the conversation. I can't recall exactly what everyone said.

Q. Will you tell us who was there? A. The Mexican, Tom, Ormento, Evola, Rocco and myself.

Q. All right. Now will you tell us what conversation there was as best you can recall? A. I refuse to make the trip and I say that only the trip could be done through Miami, I wouldn't do.

Q. And what was said? A. And after a long hours of discussion Evola proposed that why don't they do it like I say through Miami. The Mexican

say that if the trip was to take place through Miami he will need a few days after, he need to make a new set up.

Q. Just before the recess, Mr. Cantellops, you were telling us about the second meeting in the Mexican's room and about the trip. Now, will you tell us— A. Not the second, the third.

Q. In the Mexican's room? A. Yes.

• • •

Q. Was this the third meeting with the Mexican? A. Yes.

Q. Will you tell us what was said about the trip to Miami? A. Well, after long hours of discussion it was agreed it should be done through Miami.

Mr. Edelbaum: I move to strike it out.

The Court: Motion granted.

Tell us what was said.

Q. As best you can recall tell us what was said and by whom, will you? A. It was said in view of that I had nobody else to send over there to the borders, they will go along and try to make the trip through Miami.

Q. Who said that? A. Ormento.

(S8) Q. What was said that you can recall? A. At that time the Mexican say that he need a few days extra to make a new arrangement.

Q. Was there anything else said that you can recall? A. After it was agreed to make the trip to— after it was agreed, I was handed some money to take care of the Mexican for a few days in New York.

Q. Who handed you the money? A. Ormento.

Q. Now, at this conversation that you just described who participated in the conversation? A. We all, all, everybody concerned.

Q. Who did most of the talking that you can recall? A. Most of the talking was done by Ormento.

Q. After Ormento gave you the money what did you do? A. Things were left up to the Mexican to let Ormento know when the trip will start, and I took the Mexican for about three days and I showed him the city • • •.

Q. Did you go into the park? A. No.—At the dead end of 81st Street, over there, this park, in the middle of the park.

Q. Are there any lights in this area? A. In summer time due to the trees around it is very poor lighted place at night.

That while we were there:

I was offered by Ormento, if I wanted to make a trip to Philadelphia—and I said 'Alright, I will do it', and he gave me instructions what to do.

Q. Who gave you instructions? A. Ormento.

• • •

Q. And what happened when you got back to New York? A. About a couple of days later I got paid for that trip.

Q. And how did you get paid? A. By Ormento, 81st Street and Columbus Avenue.

Q. How did you happen to meet Ormento? A. I was picked by Ormento and Santora.

(S9) Q. Santora? A. Yes.

Q. Where did you go when you were picked up? A. To 81st Street and Columbus Avenue.

Q. That is the same place that you described a few minutes ago? A. Yes.

Q. Was this at night? A. About 9, 10 o'clock at night.

Q. When you got to the park did you have a conversation? A. Yes.

Q. First of all, did you get paid? A. Yes, I got paid.

Q. Who paid you? A. Ormento.

Q. And did you have a conversation at this time? A. Well, I was told to keep in contact and perhaps they need me for some time in the near future.

Q. Who was present at this conversation? A. Ormento, Rocco and Santora.

Q. Did you have occasion to go to Philadelphia again? A. Yes.

Q. And before you went to Philadelphia did you have a conversation with anybody? A. Yes.

Q. With whom did you talk?

• • •

Q. Would you tell us when the second trip occurred, the second trip to Philadelphia. A. Within a few days from the first one.

Q. Prior to the second trip to Philadelphia with whom did you talk? A. With Ormento and Santora.

Q. Where did you meet them? A. At 81st Street and Columbus Avenue.

Q. And how did you happen to meet them there? A. I was advised to wait for them. I don't recall if I was waiting in my house or if I have to go there, but I met them over there.

Q. Who advised you, do you recall? A. One of those everyday calls that I used to make to check what was new, I was advised to do that.

(S10) Q. And who would you call? A. Usually I used to call to Carmine Polizzano.

Q. Now you had a meeting up in the park, is that right? A. Yes.

Q. With whom? A. Santora and Ormento and Rocco.

Q. And did you have a conversation? A. Yes.

Q. And what was said that you can recall?

• • •

Q. And by whom? A. I was told by Ormento if I wanted to make a trip for Santora and I told

him where they could find me in case I decide to make the trip.

Q. Was anything else said that you can recall? A. I cannot recall too much about that.

Q. Do you recall any conversation about the purpose of the trip? A. It was another trip to Philadelphia.

Q. Was there any discussion about the purpose of the trip? A. As usual, to deliver stuff to Philadelphia.

Q. What happened after this conversation? A. I told them that they locate me in the Capitol Bar on 40th Street, 47th Street, in that vicinity, at any time after 9 o'clock.

Q. Did you have occasion to be at the Capitol Bar within the next few days? A. In fact, it happen the next day.

Q. What happened? A. I was in the Capitol Bar and I was picked up, called by somebody outside, and after I came out I met Santora.

Q. What did he say to you and what did you say to him? A. He say the trip is ready; somebody will drive you over there and gave me instructions, and he say the driver will tell you what to do when you reach Philadelphia.

Q. Did he say anything else to you? A. No, we went to 49th Street and close to Hertz Rent a Car Yourself there and there was a fellow working and he showed me the person and I got in the car with him.

Q. Who showed you the person? A. Santora.

(S11) Q. What did he say? A. He say, 'That is the guy who will drive it over there, he knows what to do when you reach Philadelphia.'

Q. Did you get in the car? A. Yes.

Q. And did you drive to Philadelphia? A. Yes.

Q. Were you introduced to the driver of the car? A. No.

Q. And what happened when you got to Philadelphia? A. We went to Germantown Avenue and we stop in front of a small park.

Q. A small bar? A. Park.

Q. Park? A. Yes, and we got off. Before we got off, the fellow got the stuff from behind the seat where he was sitting.

Q. How was it wrapped? A. A flat brown paper with scotch tape around.

Q. And then what happened? A. He handed it to me and he told me he will be a few feet away, that when he come walking behind a fellow that was supposed to pick up, he will make a sign with his handkerchief, and that was the fellow that was supposed to pick this up.

Q. After this conversation what happened? A. I got off and I stood around the car while he went a few feet away.

Q. That is, the driver? A. The driver. When this person came, he came behind the person, pulled his handkerchief, and I knew the sign, so I cross with the person, and I leave the package on his hands.

Q. You made a pass of the package, is that right? A. Yes.

Q. What was in the package, do you know? A. I was told was stuff.

Q. After you made the pass of the stuff to this man what did you do then? A. We drove back to New York.

Q. And did you get paid for this trip? A. Yes.

(S12) Q. And would you tell us the circumstances under which you got paid? A. I got a note—I got a message that I should be in my home again and I was picked that night again.

Q. Who picked you up? A. Ormento, Evola and Rocco, Santora.

Q. Ormento, Rocco and Santora? A. And Evola.

Q. And who else? A. Evola.

Q. Did you get paid for this trip? A. At that meeting, yes.

Q. Who paid you? A. Santora.

Q. At this meeting was there a conversation? A. Yes.

Q. And what was said? First of all, where was this meeting? A. In 81st St. and Columbus Ave.

Q. In the park? A. Yes.

Q. And what was said at this meeting as best you can recall and by whom? A. After all the conversation was done all I understood was that there was to be a delivery next day to Brooklyn."

Cantellops made the following recantations of his testimony against Santora

The July 22nd, 1960 recantation.

The July 20th, 1960 recantation.

Mt. Carmel Church recantation on January 27th, 1960.

Cantellops, in his recantations, stated,

(G-408) That he never had a transaction with Santora—didn't know the man.

(G-410) That the Mexican was a friend of his—not in the narcotics business * * * that he picked that hotel and that room because he had been in that hotel and room on many occasions with the Mexican. That the Mexican didn't have anything to do with these defendants. Never in the room. That he picked the park (G-410), because the wife of the Mexican had moved out on him, that the Mexican had an argument with his wife and she moved to a hotel facing that park and they used to sit there. That's how he came to pick that park (G-411).

Cantellops denied knowing Santora (G-436), never met Santora and Evola and the others he had testified he met in the Mexican's room; Cantellops said that had never taken place.

Cantellops said he never made a trip for Santora to Philadelphia (G-436).

That he never met with any of these defendants at the park (G-448). That he never met Ormento and never had any transactions with him (G-449).

Reasons for Granting the Writ

It is respectfully submitted that if Cantellops never knew Ormento then his testimony with respect to Santora must be untruthful, because Cantellops had testified at the trial that it was Ormento who was with Santora.

The testimony at the hearing that Cantellops had stated that he had never met Santora, had never made a trip to Philadelphia for Santora, that there were no meetings at the park and that there never was any meeting up in the Mexican's room directly refutes Cantellops testimony at the trial, and thus establishes Cantellops' untruthfulness at the trial.

The recantation at the Mt. Carmel Church was made in the presence of a Priest, a Notary Public and three lawyers on January 27th, 1960.

The recantations of July 20th and July 22nd 1960 at Siegal's office, testified to fully and in detail by Siegal, was fully corroborated by the tape recordings played before the Court and by the transcripts of said tape recordings.

The evidence against Santora was not only from a single source but limited in amount. It consisted entirely of testimony as to a meeting in a hotel room, two meetings in a park and a trip to Philadelphia.

The recantations establish conclusively that Cantellops' testimony at the trial was a deliberate lie.

It is respectfully submitted that the petitioner, Santora, has established that Cantellops gave false testimony which "Might Have" affected the verdict against him, and that the petitioner Santora's rights under the Jencks Act were violated.

Petitioner respectfully incorporates by reference in his behalf all of the contentions and citations set forth in the petition of Vito Genovese who has filed a petition for similar relief as though fully set forth herein without restatement of the same.

I respectfully submit, therefore, that this Court issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the conviction of petitioner.

Respectfully submitted,

HERBERT S. SIEGAL,
Attorney for Petitioner.

APPENDIX A

Judgment sought to be reviewed.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of March one thousand nine hundred and sixty-three.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. THURGOOD MARSHALL,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALFREDO AVILES, et al.,

Defendants,

CHARLES BARCELONA, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

Appendix A—Judgment sought to be reviewed

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are affirmed.

A. Daniel Fusaro
Clerk

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 196

VITO GENOVESE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

VITO GENOVESE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Vito Genovese prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the orders of the United States District Court for the Southern District of New York denying petitioner's motion for a new trial.

OPINIONS BELOW

The opinion of the court of appeals is reported at 315 F. 2d 186, and is reported in part at 31 U. S. LAW WK. 2470. Appendix A to this petition prints the opinion as promulgated (App. 1a-11a) and the subsequent modifications (App. 13a, 14a). The opinions

of the district court are reported at 197 F. Supp. 536 (per Judge Bicks) and at 200 F. Supp. 711 (per Judge Murphy).

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1963 (App. 12a). Rehearing and rehearing *in banc* were denied on April 10, 1963 (App. 15a). The time for filing of this petition was extended until June 8, 1963, by order of Associate Justice Harlan, entered on April 26, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the "clearly erroneous" standard, rather than review *de novo*, is applicable to review of district court *in camera* determinations of the producibility of statements under sub-section (e)(2) of the Jencks Act, 18 U.S.C. § 3500(e)(2).

2. Whether interview notes which are not entirely in the witness' own words but are found by the district court to "set forth in substance what the witness said", qualify as a "substantially verbatim recital" within the meaning of the Jencks Act, 18 U.S.C. § 3500 (e)(2).

3. Whether a government agent's deliberate omission from his interview notes of statements made during periods of the interview when the witness says nothing helpful to the government, or nothing relating to the subject matter of his direct examination, precludes all notes taken during the remainder of the interview from qualifying as "substantially verbatim" under 18 U.S.C. § 3500(e)(2).

4. Whether petitioner's due process or Jencks Act rights were violated by the government's unilateral

determination to withhold from the trial judge, after a proper defense request for Jencks materials, extensive interview notes taken by an Assistant United States Attorney, where such notes included statements which would have seriously impeached the testimony of the sole witness against petitioner and been producible under 18 U.S.C. § 3500(e)(2) as interpreted by the trial court.

5. Whether pre-trial destruction of a government agent's interview notes, arguably within 18 U.S.C. § 3500(e), warrants invocation of sanctions under § 3500(d) or otherwise:

(a) where the agent testifies that he destroyed his notes in accordance with regular practice;

(b) where the agent testifies that he destroyed his notes deliberately in order to circumvent the Jencks rule.

6. Whether, if petitioner does not receive a new trial on the basis of asserted Jencks Act violations, the case should be remanded to the district court for reconsideration of the remaining grounds of petitioner's new trial motion in the light of additional evidence first made available to the defense after the motion's denial.

STATUTE INVOLVED

The Jencks Act, 18 U.S.C. § 3500, is printed as Appendix B to this petition (App. 16a-17a).

STATEMENT

The district court proceedings leading to the affirmance from which certiorari is here sought are summarized by the court of appeals as follows.

> "After a three months' jury trial in the Southern District of New York, appellants were con-

victed, on April 17, 1959, of conspiracy to violate federal narcotic laws, 21 U.S.C. §§ 173, 174. Their convictions were affirmed on appeal to this court, 274 F. 2d 179, and the Supreme Court denied certiorari, 362 U.S. 974, 982, *rehearing denied,* 363 U.S. 858.

"On August 26, 1960, appellants moved in the district court for a new trial, Rule 33, Fed. R. Crim. P., and put forth, as grounds for their motions: (1) alleged recantations of trial testimony by the principal government witness, Nelson Cantellops; (2) statements by Cantellops at the hearing on the motions for a new trial which were allegedly inconsistent with his original testimony; (3) allegedly new extrinsic evidence tending to establish Cantellops' perjury in his trial testimony concerning a certain trip to Las Vegas, Nevada; (4) alleged concealment at the trial of a rent record in the possession of the Government; (5) alleged post trial statements by Cantellops which tended to discredit his trial testimony; (6) alleged spoliation of notes of federal Narcotics Agents Rowan, Consoli, and Muglia, in violation of the Jencks Act, 18 U.S.C. § 3500; and (7) failure of the Government to make available to the trial court certain interview notes of Assistant United States Attorney Donald H. Shaw, which notes were allegedly producible under the Jencks Act, 18 U.S.C. § 3500.

"After extended hearings, Judge Bicks, who had presided at the original trial, denied appellants' motions insofar as they rested upon grounds 1 through 6 set forth above. 197 F. Supp. 536. He reserved decision with respect to the Shaw interview notes, indicating his intention to take further testimony regarding this issue. Due to the illness of Judge Bicks, however, the contemplated voir dire examination was not held. Judge Murphy was subsequently assigned to conduct the hearing and make a determination as to the ground upon

> which Judge Bicks had reserved decision. On December 22, 1961, Judge Murphy denied the motions for a new trial. 200 F. Supp. 711." (App. 2a-3a).

Continuing the narrative of proceedings, on December 28, 1961, petitioner filed a notice of appeal from the order of Judge Murphy denying the motion for new trial (1798a-99a),[1] and the appeal was consolidated with that previously taken from the order of Judge Bicks (App. 3a).[2] On January 12, 1962, the government moved for reargument of the portion of Judge Murphy's decision holding that interview notes of Assistant United States Attorney Shaw dated October 10 and 11, 1957, "most assuredly should have been produced pursuant to § 3500" (1804a-16a). The motion included a prayer for leave to file an annexed affidavit of Shaw in support of the reargument motion (1804a). On January 17, 1962, the motion was denied in its entirety (1827a). No appeal was taken by the government either from Judge Murphy's decision of

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[1] The following method of citing record references is used herein:

Proceedings and exhibits on the motion for new trial are cited to petitioner's appendix in the court of appeals (vols. I through IV). These citations have the suffix "a" and no prefix. Proceedings on the original trial are cited to the appendix to this petitioner's brief on the appeal from conviction, which was rebound as a separate appendix volume to petitioner's brief on the instant appeal. These citations have the prefix "Tr." and the suffix "a". Unprinted portions of the proceedings on the original trial are cited to the typewritten transcript. These citations have the prefix "Tr." and no suffix. Certain trial exhibits are cited to the appendix to the petition for rehearing on the instant appeal. These citations have the prefix "R." and the suffix "a". Other record references are stated in full.

[2] To avoid any problem as to whether Judge Bicks' order had remained non-final until entry of Judge Murphy's, the December 28 notice of appeal included both orders (1798a).

December 22, 1961, which included an order that the government turn over to the defense copies of the October 10 and 11 interview notes (1796a, 200 F. Supp. at 718), or from the order of January 17, 1962, denying the motion for reargument and for leave to file the Shaw affidavit.

On the consolidated appeal, the court affirmed the denial of grounds one through six of the motion on the opinion of Judge Bicks below (App. 3a). The court's opinion was devoted solely to ground seven, which had been determined by Judge Murphy. The first four of the six questions presented in this petition relate to ground seven of the motion; the fifth relates to ground six. The sixth question relates to grounds one through five, but is included not to seek review in this Court of the merits of Judge Bicks' affirmed rulings on those grounds, but rather to preserve if necessary a claim for remand for further consideration of such grounds, in the light of the additional evidence first made available to the defense through the production of Shaw's notes subsequent to Judge Bicks' (and to Judge Murphy's) decision.[3]

Grounds six and seven of the motion for new trial both were predicated upon deprivation of government agents' notes of their interviews with the principal witness at trial, Nelson Silva Cantellops. These were notes which had not been before the trial court for its

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[3] Petitioner's detailed challenge to many of Judge Bicks' rulings on the first five grounds of the motion as unsupported by evidence or contrary to the weight of the evidence was rejected by the court of appeals (App. 3a). Since petitioner does not here seek further review of these rulings *made upon the record as it existed before Judge Bicks*, no summary of the voluminous testimony concerning these grounds of the motion is attempted herein. See pp. 43-44, *infra*.

determination of producibility under the Jencks Act. The notes referred to in ground six had been destroyed prior to trial; the notes referred to in ground seven had been in the government's possession at the time of trial. The notes referred to in ground six had been taken by narcotics agents Rowan, Consoli and Muglia. The latter two testified at the hearing on the new trial motion that they had destroyed the notes routinely (see 826a, 902a; 1361-63a, 1375-77a), and this testimony was accepted by the district court, see 197 F. Supp. at 557-58. Agent Rowan, by contrast, testified that he had destroyed his interview notes for the purpose of preventing their production under the Jencks rule (see 916a, 1137a, 1146a), but this testimony as to Rowan's purpose was not accepted by the district court, see 197 F. Supp. at 555. The notes referred to in ground seven had been taken by Assistant United States Attorney Shaw in the course of numerous interviews with the witness Cantellops conducted prior to the return of the indictment (see 1631a-34a; 197 F. Supp. at 558; 200 F. Supp. at 713, 715). It was undisputed that these notes had been in the government's possession at the time of trial but had not been furnished for the trial judge's inspection when he conducted an *in camera* examination of documents which might contain statements of the witness Cantellops producible under the Jencks Act. See 1770a, 1779a; 197 F. Supp. at 558; 200 F. Supp. at 714; App. 11a, n. 3, 13a.

Cantellops' Testimony Against Genovese

The witness Cantellops had been described by the court of appeals, in affirming the judgments of conviction, as "the principal government witness" to the conspiracy of which defendants were convicted. *United States* v. *Aviles*, 274 F. 2d 179, 182 (2d Cir.), *cert. de-*

nied, 362 U.S. 974, 982, *rehearing denied*, 363 U.S. 858 (1960).[4] In addition, as the trial court instructed the jury,

> "The witness Cantellops gave the only testimony concerning the defendant Vito Genovese." (Tr. 1101a.)[5]

In opposing review of the conviction by this Court, the government conceded that Cantellops' testimony was "not corroborated as to Genovese". Brief for the United States in Opposition to Certiorari, p. 28, *Genovese* v. *United States*, 362 U.S. 974 (1960), No. 817, Oct. T. 1959.

In his uncorroborated testimony against petitioner, Cantellops claimed to have seen Genovese on only four occasions:[6]

1) In the spring or early summer of 1956, on East Fourth Street, where Genovese was sitting in a car, talking to the defendant Carmine Polizzano (Tr. 340a).

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[4] The evidence at trial to establish the existence of the alleged "conspiracy to import, distribute, purchase and sell narcotics in violation of law" is summarized in the opinion affirming the convictions; it consists primarily of "testimony of the principal government witness, Nelson Silva Cantellops" as to his various trips from New York to deliver or pick up narcotics and as to activities in which he participated to plan and execute the distribution of narcotics locally in New York. See *United States* v. *Aviles*, *supra*, at 182-86.

[5] As to three other of the seventeen defendants on trial, namely Barcellona, Evola and Gigante, the instructions likewise stated that Cantellops had furnished the sole evidence (see Tr. 1081a, 1094a, 1099a).

[6] The testimony concerning Genovese consumed only some eight minutes on direct examination, and eleven minutes on cross-examination by counsel for Genovese, in the course of a three month trial (see Tr. 937a).

2) Later in the spring or early summer of 1956, on East Fourth Street, where Genovese was again talking to Carmine Polizzano (Tr. 340a-41a).

3) In early August of 1956, in a German restaurant on East 86th Street, where Genovese was talking to the defendant Ormento (Tr. 302a-03a).

4) At the end of August or the beginning of September 1956, when Genovese was present with Cantellops in a car proceeding up the West Side Highway to the defendant Mazzie's house in the Bronx, and during the latter part of a meeting in the basement of that house (Tr. 337a-42a, 350a-51a).

At the hearing on the new trial motion, Cantellops conceded that one of the foregoing occasions on which he allegedly saw Genovese did not occur. Cantellops' testimony did not make clear whether it was the first or the second occasion as to which he had been in error.

> "A. I saw him, all together in this transaction, three times, once in Fourth Street, once in the restaurant and again during the meeting.
>
> Q. Didn't you testify that you had seen him two times with Pollizzano? A. I never said so.
>
> * * *
>
> Q. So that your testimony now is whatever you said there you intended only to testify to one occasion when you saw Mr. Genovese with Mr. Pollizzano; is that right? A. Yes. I was testifying more or less the first time." (248a-49a).[7]

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[7] Although Cantellops claimed that he had not said at trial that he saw Genovese twice with Carmine Polizzano on Fourth Street (245a-48a), the trial testimony plainly contradicts this claim (see Tr. 338a, 340a-41a). On the appeal from conviction, the government stated that Cantellops had testified to two such meetings, in summarizing the evidence to this Court and to the court below. Brief for the United States in Opposition to Certiorari, p. 11, n. 8, *Genovese* v. *United States*, *supra*; Brief for Appellee, pp. 55-56, 107, *United States* v. *Aviles*, *supra*. The trial court's instructions likewise referred to two such meetings with Carmine Polizzano (Tr. A. 1101a).

Only on the fourth of the above-cited occasions did Cantellops claim to have heard what was said to or by or in the hearing of Genovese. The alleged conversation involving Genovese on that occasion, insofar as it concerned narcotics, dealt with plans for distribution of narcotics in New York; Cantellops mentioned no discussion as to the narcotics being imported (see Tr. 339a-40a, 350a-51a). Cantellops did not claim that Genovese or any other person present was in possession of narcotics on any of the four occasions. The jury, however, was not instructed that a defendant cannot be convicted of conspiracy to violate 21 U.S.C. §§ 173, 174, unless he had knowledge of importation of the narcotics which were the subject of the conspiracy or possession of narcotics from which such knowledge may be presumed (see Tr. 1059a-68a).[8] Indeed, the statutory presumption was not mentioned in the charge to the jury. Petitioner was therefore convicted solely upon uncorroborated accomplice testimony, which arguably included no evidence at all as to an essential element of the offense. It is against this backdrop that the district court and the court of appeals had to weigh the importance to this petitioner of the deprivation of any interview notes that might have impeached the witness Cantellops.

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[8] A similar omission from the instructions was held "plain error" by the court below in reversing convictions for conspiracy to violate 21 U.S.C. §§ 173, 174 in *United States* v. *Massiah*, 307 F. 2d 62, 70-71 (2d Cir. 1962). There,

> "[T]he court charged under the wrong statute (18 U.S.C. § 371) and in so doing omitted to charge, indeed rejected the idea, that the jury must find that the drugs were imported to the knowledge of each defendant in violation of law." *Id.* at 70.

The same error was committed in the instant case by charging "under the wrong statute (18 U.S.C. § 371)". See Tr. 1061a.

Rulings on Shaw's Interview Notes Below

The district court nevertheless held that petitioner was not prejudiced by the wrongful withholding of interview notes producible under § 3500. 200 F. Supp. at 714-18; see App. 5a-6a. As to one group of the withheld notes, comprising 61 pages (1853a-1913a), Judge Murphy held the deprivation non-prejudicial on the ground that, "we find that virtually the entire contents of [this group of] Shaw's notes correspond with the grand jury testimony of Cantellops which was turned over to the defense." 200 F. Supp. at 715; see App. 5a. Another group of interview notes, comprising 24 pages (1829a-52a), dated October 10 and 11, 1957, were found to contain impeaching material absent from the grand jury minutes, including "materially false versions of two of Cantellops' trips, one to Las Vegas and one to Miami . . . ." 200 F. Supp. at 716. The basis for holding deprivation of these notes non-prejudicial was, apparently, that Cantellops was so thoroughly discredited that a showing of additional falsification "would simply add umber to an already blackened witness." As stated by the court of appeals:

> "Although these notes contained new impeaching information not otherwise available to appellants, Judge Murphy ruled that nonproduction of these notes did not prejudice defendants' interests, in that defendants' cross-examination of Cantellops was not 'unduly restricted' thereby:
>
> ' * * * this witness was subjected to a most complete and searching cross-examination by able and experienced counsel during a period of 14 trial days, in the course of which his character and credibility were thoroughly explored and devastatingly attacked. The facts of his considerable prior criminal activities, his affliction with a loathsome disease, his immorality, his perjuries and his motive to misrepresent were all paraded before the jury without quarter. To be able with the use of the October notes to show that Cantellops spoke

> untruthfully on yet another occasion * * * would simply add umber to an already blackened witness.' 200 F. Supp. at 717." (App. 5a-6a.)

The court of appeals expressly refrained from passing upon Judge Murphy's conclusion that the withholding of the Shaw notes was harmless error (see App. 6a). It should be observed, however, that neither in brief nor oral argument in the court of appeals did the government attempt to defend this conclusion. Its brief was silent upon the point.[9] When pressed on the point at oral argument, government counsel declined to support Judge Murphy's reasoning; he acknowledged that, if the government had "acted improperly" in withholding producible notes containing "something of any materiality", there would be prejudice. See court reporter's transcript of the oral argument (filed below and lodged in this Court) at pp. 120-22. On the other hand, as the opinion below notes, petitioner directed his "major attack" to the harmless error ruling (App. 6a)—for this was the only basis on which Judge Murphy had denied petitioner's new trial motion. With regard to Judge Murphy's finding that the group of 61 pages of notes "virtually . . . correspond" with the grand jury minutes, petitioner's brief noted, without being exhaustive, 61 material discrepancies between the notes and minutes. Brief on behalf of Defendant-Appellant Genovese, pp. 66-95. With respect to the 24 pages of October 10 and 11 notes, petitioner made a showing that these directly impeached 9 of the 27 episodes to which Cantellops had testified at trial, partially impeached 3 others, and indirectly impeached the remainder by a fatal discrepancy as to one episode's date. See *id.* at pp. 37-59. As already noted, petitioner's contentions in this regard were left undis-

[9] Copies of the briefs filed in the court of appeals by this petitioner and by the government have been lodged with the clerk of this Court.

puted and unanswered by the government in the court of appeals. Nor had Judge Murphy passed upon these contentions, since the notes were not disclosed to defendants until after Judge Murphy ruled.[10]

The court of appeals, while not passing upon the one issue decided by Judge Murphy in the government's favor, passed on the three other contentions which the government had urged below (App. 6a). It upheld Judge Murphy's rulings rejecting two of the government's contentions: that defendants had waived their right to object to the government's non-production of the Shaw notes at trial; and that statements to a government attorney are not within 18 U.S.C. § 3500 (e)(2) because an attorney is not an "agent of the Government" within the meaning of that subsection (App. 6a-8a). The government's third contention, that the notes contained no "substantially verbatim

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[10] In the decision of December 22, 1961, denying the motion for a new trial, Judge Murphy ordered that the October 10 and 11 notes be disclosed to the defense, and that the remainder be sealed. 200 F. Supp. at 718. After denial on January 17, 1962 of the government's motion for reargument with respect to the October notes (A. 1827a), those notes were first made available to the defense.

Petitioner thereafter moved the court of appeals for release of the remaining Shaw notes for use on the appeal. The court of appeals, by order of February 23, 1962, granted the motion "to the extent of such notes as Judge Murphy shall determine, either with or without a hearing in his discretion, to have been producible under the Jencks Act". Record of proceedings in the court of appeals (Vol. VIII of the record filed in this Court), p. 34. Acting pursuant to that order, Judge Murphy then directed by order of May 7, 1962, that 61 additional pages of the notes (1853a-1913a) be turned over, and the remaining 18 pages withheld. The 18 pages were held not producible under § 3500; with respect to the 61 pages, Judge Murphy held that any doubts should be resolved "in favor of disclosure at this juncture without the delay and expense that a hearing for that purpose would entail." See order of May 7, 1962, at pp. 9893-94 of the supplemental record on appeal, filed in this Court.

recital" of any statement by Cantellops, was upheld by the court of appeals, although it had been rejected by Judge Murphy (App. 9a-11a).

Judge Murphy applied to the notes "the same standard applied by the trial court, and that is, 'do they set forth in substance what the witness said.'" 200 F. Supp. at 715. Applying this standard,

> "[W]e find that the great majority of them are probably Jencks 'statements' and that a *voir dire* by the trial judge would have resulted in the government being ordered to turn them over to defense counsel." *Ibid.*

With respect to the notes other than those of October 10 and 11, the finding that they "would have" been held producible by the trial court was not further elaborated. With respect to the 24 pages of October 10 and 11 notes (1829a-52a), Judge Murphy further found that these "are in fact, substantially verbatim statements", and that they "most assuredly should have been produced" at trial.

> "These October, 1957, notes were therefore producible if they contained 'in substance what the witness said,' there being no question here but that they were in fact contemporaneously written by Shaw. From the beginning to the end of these particular notes they are written in the first person and they contain numerous quotes for responses or questions of third persons with whom Cantellops apparently narrates he was conversing. This, together with the very 'flavor' of the notes, and bearing in mind Shaw's testimony at the post-trial hearing, *inter alia*, as to the difficulty of taking a statement from Cantellops, constrains us to conclude (and no *voir dire* seems necessary for us to so find) that these notes would be found by the trial court to be, and are in fact, substantially verbatim statements, and of course, relevant to Cantellops' trial testimony on direct examination. The difficult issue here is that of prejudice, for

the notes most assuredly should have been produced pursuant to § 3500." 200 F. Supp. at 715-16.

The court of appeals declined to accept Judge Murphy's finding that the October 10 and 11 interview notes were "substantially verbatim statements" and that the great majority of Shaw's other interview notes were "probably Jencks 'statements' ". Instead, the Court redetermined *de novo* "this factual issue" (App. 9a). Expressly relying upon the Shaw affidavit which Judge Murphy had denied leave to file (see p. 5, *supra*), the appellate court concluded that none of Shaw's interview notes constituted "a substantially verbatim recital of an oral statement made by" the witness Cantellops to Shaw. For this reason the government's action in withholding the Shaw interview notes from the court at trial, although denounced by the court of appeals,[11] was held not to warrant a new trial. (App. 9a-11a.)

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[11] In its opinion promulgated on March 8, 1963, the court stated:

> "Our conclusion in this respect should not be read as a condonation of the Government's failure to deliver the Shaw materials to the trial court for *in camera* inspection. We fully concur in Judge Murphy's disapproval of the Government's reprehensible actions in this respect. 200 F. Supp. at 714." (App. 11a, n. 3.)

The second sentence of the foregoing was modified by direction of Judge Waterman on March 19, 1963:

> "On slip sheet 1354, footnote 3, please strike the second sentence and insert in lieu thereof, 'See Judge Murphy's discussion, 200 F. Supp. at 714.' " (App. 13a.) The cited page of Judge Murphy's opinion held that even "doubtful" Jencks material should have been turned over to the trial court by the government, and that "Unilateral action on the part of the government in fairly doubtful instances cannot be condoned." Judge Murphy went on to find that the instant situation was not even "fairly doubtful" with respect to at least certain of the notes unilaterally withheld; the October 1957 notes "most assuredly should have been produced pursuant to § 3590." 200 F. Supp. at 716.

REASONS FOR GRANTING THE WRIT

The basic consideration for granting certiorari here rests upon what the Court did, and did not, decide in *Campbell* v. *United States*, No. 631, Oct. T. 1962 (May 27, 1963). (This decision is hereinafter cited as *Campbell*, with page references to the slip opinion; the previous decision in the same case, 365 U.S. 85 (1961), is cited as *Campbell* I.) In *Campbell*, as in the instant case, a district judge (other than the trial judge) found, in a post-trial proceeding, that material denied to the defense at trial was in fact producible under the Jencks Act, 18 U.S.C. § 3500. In both cases the district judge's determination of producibility was rejected by the court of appeals. In *Campbell* this Court reversed on the ground that the district judge's determination must be accepted unless "clearly erroneous". A similar disposition is warranted here, where the court of appeals avowedly made its own factual findings instead of limiting its review to determining whether the findings of the district judge were "clearly erroneous" (see App. 9a).

In *Campbell* this Court's ruling that the typewritten Interview Report was producible under § 3500(e)(1) rendered it unnecessary for the Court to reach the further questions, upon which certiorari had been granted, as to whether the typewritten report or the original interview notes were "substantially verbatim" statements within the meaning of § 3500(e)(2); and whether destruction of producible interview notes entails the imposition of sanctions under 18 U.S.C. § 3500 (d). See *Campbell* at 4, n. 5. The instant petition presents the questions as to the meaning of "substantially verbatim", and the effect of destruction of interview notes, left open by *Campbell*. The significance

to the government of the issues presented in *Campbell* has already been called to the Court's attention by the Solicitor General:

> "[T]he issues are of great importance to the government in the enforcement of federal criminal statutes." *Campbell*, Motion for Transfer of the Case from the Summary Calendar.

By the same token these issues are of great importance to determination of the rights of defendants in federal criminal prosecutions. This is further discussed under the enumerated reasons for granting the writ, which correspond to the numbers of the questions presented.

1. Certiorari should be granted, on the first of the questions presented, for the reason that a decision of this Court, subsequent to the decision below, has shown the court of appeals to have been in error. Such error consists in reviewing *de novo* the district court's determinations that documents were producible under § 3500 instead of applying the "clearly erroneous" standard of review to the trial court's rulings. In *Campbell* both the majority and dissenting opinions applied the "clearly erroneous" standard; the disagreement was as to whether on that record the district court's determination should be held "clearly erroneous".

The adoption of *de novo* review instead of the "clearly erroneous" standard cannot be justified by any valid distinction between the instant situation and *Campbell*. In *Campbell*, as here, the factual findings warranting producibility were made by a district judge other than the trial judge. The opinion in *Campbell* dealt with findings under § 3500(e)(1), while the findings here were under § 3500(e)(2). But no different standard of review is appropriate to determinations

of producibility under the two subsections. The rationale for upholding the district court finding under subsection (e)(1) in *Campbell* was taken from *Palermo* v. *United States*, 360 U.S. 343, 353 (1959), which had involved the determination of producibility under subsection (e)(2).

> "Final decision as to production must rest, as it does so very often in procedural and evidentiary matters, within the good sense and experience of the district judge guided by the standards we have outlined, and subject to the appropriately limited review of appellate courts." 360 U.S. at 353 (footnote omitted); quoted in *Campbell* at 6.

As is apparent from *Campbell's* reliance on *Palermo*, the nature of the determination of producibility under subsection (e)(1) and (e)(2) is similar, combining strictly factual findings with an exercise of judgment peculiarly within the ken of a district judge, "subject to the appropriately limited review of appellate courts." A district court's determination under § 3500 (e)(2) of whether "the statement could fairly be deemed to reflect fully and without distortion what had been said to the government agent", *Palermo*, *supra*, at 352, is similar to the determination required of the district judge in *Campbell* under (e)(1): "whether Toomey's oral version of the notes may fairly be deemed a reading back of the notes to Staula; and whether the Interview Report may fairly be deemed a copy of the notes." *Campbell*, at 5.

The questions arising under subsections (e)(1) and (e)(2) are, petitioner submits, equally "ones of fact, the determination of which by the district judge may not be disturbed unless clearly erroneous", *id.* at 5-6. The court below frankly recognized that determination

of whether the interview notes in this case were "statements" within the definition of § 3500(e)(2) was a "factual issue" upon which it chose to substitute its judgment for that of the district court.

> "In ruling that the October 10 and 11 notes were Jencks 'statements,' and that the great majority of Shaw's other original interview notes were probably 'verbatim recitals' within the Act's definition, Judge Murphy relied solely upon the notes themselves and upon the record of Shaw's earlier testimony before Judge Bicks. Judge Murphy conducted no voir dire examination of Shaw and received no testimony from any other witness prior to ruling upon this portion of appellants' motions.[1] As we have available to us all of the materials upon which Judge Murphy based his rulings, our conclusion with respect to this factual issue is entitled to no less weight than that of the Court below."

"[1] Judge Murphy was not, of course, required to conduct a voir dire examination of Shaw, or to hold any hearing whatever, before determining whether these disputed documents were within the Jencks Act. As the Supreme Court said in *Palermo* v. *United States*, 360 U.S. 343, 344-45 [sic] (1959), it is 'the function of the trial judge to decide in the light of the circumstances of each case, what, if any, evidence extrinsic to the statement itself may or must be offered to prove the nature of the statement.'" (App. 9a.)

Nor should the applicable standard of review be dependent upon whether the district judge heard testimony from the interviewer, or the interviewee. Under the procedure prescribed by *Palermo, supra*, at 354-55, *in camera* determination of producibility not only is authorized; it will presumably encompass the majority of cases.

> "It is also the function of the trial judge to decide, in light of the circumstances of each case,

> what, if any, evidence extrinsic to the statement itself may or must be offered to prove the nature of the statement. In most cases the answer will be plain from the statement itself. In others further information might be deemed relevant to assist the court's determination." *Id.* at 354-55.

The court of appeals here expressly approved the procedure followed by Judge Murphy in reaching his decision without a voir dire examination of the interviewer Shaw (App. 9a, n. 1, quoted *supra;* see also n. 10, *supra*). Since determinations of producibility under § 3500 are commonly made *in camera*, or on undisputed testimony, it would place a tremendous burden upon the appellate courts to require *de novo* review on appeal. Such a revolution in appellate procedure in federal criminal cases should not be sanctioned without this Court's consideration.

The rule of *de novo* review here adopted by the Second Circuit is in conflict with the holding of *Hance* v. *United States*, 299 F. 2d 389, 397 (8th Cir. 1962) that the "clearly erroneous" standard of review is applicable to *in camera* determinations as to producibility under the Jencks Act. The *Hance* holding was cited with approval by this Court in *Campbell*, at 6. The nascent conflict between the Second and Eighth Circuits created by the decision below has thus apparently been resolved by this Court. Petitioner should be entitled on certiorari to derive the benefit of that resolution.

The propriety of the *de novo* review accorded below is further called into question by the court's use of a dual standard. With respect to the notes which the district court had held within § 3500(e)(2), or probably so, the court of appeals made its own findings

(App. 9a). But with respect to materials found not "substantially verbatim" by the district court, the court of appeals affirmed on the ground that "We cannot say that Judge Murphy's findings with respect to these materials were clearly erroneous." (App. 4a-5a.) After the filing of a petition for rehearing taking exception to this use of a dual standard (Petition for Rehearing on behalf of Defendant-Appellant Genovese, p. 13), the court directed the deletion from its opinion of the word "clearly" before "erroneous". (App. 14a). Even then, however, the court did not purport to make a *de novo* determination with respect to these materials. The Second Circuit is not merely in conflict with the Eighth and with *Campbell*; it is in conflict with itself in the very same opinion.

A further disturbing aspect of the *de novo* review, petitioner submits, brings the case within the rule that certiorari is appropriate, "Where a court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision." Rule 19(b), Supreme Court Rules. Petitioner contends that such departure is involved in the appellate court's reliance (App. 10a-11a) upon an *ex parte* affidavit that was written after the decision from which petitioner had appealed. The affidavit by Shaw, dated January 10, 1962 (1816a), was submitted well after the district court's findings and opinion, rendered December 22, 1961, 200 F. Supp. 711 (1796a), and after petitioner's filing of a notice of appeal on December 28 from the decision of December 22 (1799a). The affidavit was tendered in support of the government's motion for reargument of the December 22 decision. However, under the district court's rules the affidavit could not even

be filed in support of such a motion without leave of court. Rule 9(m), General Rules of the United States District Court for the Southern District of New York. The government incorporated a motion for leave to file in its motion for reargument (1804a); but the motion was denied in its entirety (1827a). (Nor was an appeal from such denial taken by the government.)[12] Thus the court of appeals was reversing the district court's finding that Shaw's notes were "substantially verbatim" on the basis of *ex parte* evidence never adduced in the district court, and so of course immune from cross-examination. In *Lev* v. *United States*, 360 U.S. 470 (1959), similar reliance upon an interviewer's affidavit to *affirm* a district court finding of non-producibility was in issue before this Court under the limited grant of certiorari (question No. 5). But the disposition of *Lev* by an equally divided Court has left the issue unresolved.

2. The second of the questions presented here involves an issue raised but not resolved in *Campbell*: the proper definition of "substantially verbatim" as

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[12] The order denying leave to file was not interlocutory, since nothing remained to be decided by the district court. *Compare Andrews* v. *United States*, No. 491, Oct. T. 1962 (U.S., May 20, 1963). Arguably the ruling was appealable under 28 U.S.C. § 1291, which "applies to criminal actions, and to either party to the controversy including the Government", Note, 106 U. PA. L. REV. 612, 613, n. 6 (1958). Even in criminal cases § 1291 permits government appeals from decisions which "pertain to an independent peripheral matter", *Carroll* v. *United States*, 354 U.S. 390, 414 (1957).

Similarly, the government may have been entitled to appeal from the denial of its motion for reargument of the December 22 decision, or from the part of such decision on which reargument was sought. The government's failure to appeal raises a threshold question as to whether that part of the December 22 decision was subject to any appellate review, *de novo* or otherwise.

used in 18 U.S.C. § 3500(e)(2). (See question No. 2 in the *Campbell* Petition for Certiorari.) The question is one of widespread importance in the administration of federal criminal justice; it is potentially present in every prosecution where a government witness has been interviewed prior to trial and the interviewer has made notes. In addition, as pointed out in the *Campbell* Petition for Certiorari, p. 11, the interpretation of "substantially verbatim" has given rise to conflict among the circuits, calling for resolution by this Court.

As the *Campbell* petition noted, the restrictive interpretation of "substantially verbatim" by the First Circuit in *Campbell*, 296 F. 2d 527, 532 (1st Cir. 1961), 303 F. 2d 747, 748, (1st Cir. 1962), conflicted with the Second Circuit interpretations in *United States* v. *Thomas*, 282 F. 2d 191, 194 (2d Cir. 1960) and *United States* v. *McKeever*, 271 F. 2d 669, 674-75 (2d Cir. 1959),[13] with the Fifth Circuit interpretation in *Papworth* v. *United States*, 256 F. 2d 125, 129 (5th Cir.), *cert. denied*, 358 U.S. 854 (1958), and with the interpretation of a district court of the Third Circuit in *United States* v. *Waldman*, 159 F. Supp. 747, 749 (D.N.J. 1958).[14]

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[13] See also *United States* v. *Annunziato*, 293 F. 2d 373, 381 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961); *United States* v. *Palermo*, 258 F. 2d 397, 399 (2d Cir. 1958) ("reasonably accurate or authenticated statements" are within § 3500(e)), *affirmed*, 360 U.S. 343 (1959).

[14] The First Circuit in *Campbell* contended that its interpretation of "substantially verbatim" was in accord with that of the District of Columbia Circuit in *Borges* v. *United States*, 270 F. 2d 332 (D.C. Cir. 1959), *cert. denied*, 361 U.S. 971 (1960). *Campbell* v. *United States*, 296 F. 2d 527, 533 (1st Cir. 1961). However, the very brief opinion in *Borges* does not appear to bear this contention out. More recently the District of Columbia Circuit has cited with approval both the Second Circuit opinion in *United States* v. *McKeever*, *supra*, at 673-75, and the district court opinion in the

The conflict between the First and Second Circuit views was recently pointed out by the Court of Appeals for the Ninth Circuit in *Ogden* v. *United States*, 303 F. 2d 724, 735 n. 35 (9th Cir. 1962),[15] although the Ninth Circuit did not there find it necessary to reach a choice between the conflicting positions. The opinion below may appear to change the foregoing alignment, by interpreting "substantially verbatim" almost as narrowly as the First Circuit in *Campbell;* but the opinion did not purport to overrule, nor even cite, the prior Second Circuit decisions on point. The *Thomas* definition of a "substantially verbatim" statement as "a fairly comprehensive reproduction of the witness' words" thus, apparently, still stands in opposition to the First Circuit view in *Campbell.*

The basic conflict remains in any event between the narrow First Circuit interpretation in *Campbell, supra,* requiring stenographic completeness in longhand notes, and the Fifth Circuit view that longhand notes recording "the highlights of the conversation" qualify as "substantially verbatim", *Papworth, supra,* at 129. The government itself appears to have alter-

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instant case, *United States* v. *Aviles*, 200 F. Supp. 711, 715 (S.D.N.Y. 1961). *Saunders* v. *United States*, ... F. 2d .... (D.C. Cir. No. 17,122, Jan. 31, 1963), per Justice Reed, sitting by designation, slip op. at 6. The page of the *Aviles* opinion to which *Saunders* cites is the portion of Judge Murphy's opinion holding that interview notes taken by an Assistant United States Attorney were producible under 18 U.S.C. § 3500(e)(2) if they contained "in substance what the witness said".

[15] "As to the meaning of 'substantially verbatim' and 'contemporaneously,' compare the restrictive reading of *Campbell* v. *United States*, 296 F. 2d 527, 532 (1st Cir. 1961), with the more liberal construction of *United States* v. *Thomas*, 282 F. 2d 191, 194 (2d Cir. 1960), and *United States* v. *McKeever*, 271 F. 2d 669, 675 (2d Cir. 1959)." 303 F. 2d at 735, n. 35.

nated between these positions in this Court. While in *Campbell* it espoused the First Circuit position, in *Campbell* I it had cited as authority on the producibility of an agent's longhand notes: "See *United States* v. *Papworth*, 156 F. Supp. 842, 853-854 (N.D. Tex.), *affirmed*, 256 F. 2d 125 (C.A. 5), *certiorari denied*, 358 U.S. 854." Brief for the United States, p. 22, n. 9, *Campbell* I. The government thus appears to have approved the *Papworth* ruling, that the defendant was entitled to longhand notes of an F.B.I. agent, which concededly "were not 'word for word' recordings", where the "notes were made during the conversation [with the witness] and the F.B.I. agent specifically stated that the notes contained the *substance of the information* given to him by the witness." 156 F. Supp. at 853 (emphasis supplied).[16]

The instant record presents the "substantially verbatim" issue more sharply than the record before the Court in *Campbell*, since here the handwritten interview notes held not "substantially verbatim" by the court of appeals have been preserved and are reproduced in the record (1829a-1913a). In *Campbell*, on the other hand, the handwritten interview notes had been destroyed, and the question of their "substantially verbatim" character had to be determined merely from oral testimony based upon recollection some four years old. See *United States* v. *Campbell*, 199 F. Supp.

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[16] The *Papworth* criterion was further supported by the government in the same brief by the attempt to distinguish between an interview report of the witness Yates, produced at trial, and the interview report of the witness Staula. The distinction was warranted, according to the government, because "Yates testified that the report was *substantially correct* (R. 62), *thereby* qualifying it under subsection (e)(2), whereas Staula said that the report relating to him was not." Brief for the United States, p. 20, *Campbell* I (emphasis supplied).

905 (D. Mass. 1961). This is the first occasion of which petitioner is aware that extensive handwritten interview notes have been brought before this Court for determination of producibility under the Jencks Act. Yet it is such longhand interview notes which furnish the stuff of which the day to day problems under the Jencks Act are made. Typically, the typewritten reports whose "substantially verbatim" character must be determined under § 3500(e)(2) will derive from the agent's previous handwritten interview notes (and, almost as typically, the handwritten notes have been destroyed or are otherwise absent from the record). See, *e.g.*, *Campbell* and *Thomas*, *supra*; *McCarthy* v. *United States*, 301 F. 2d 796 (3d Cir. 1962); *Killian* v. *United States*, 368 U.S. 231 (1961). In addition, in many cases where no typewritten report has been made of a witness' interview, there will at least be handwritten interview notes taken by an Assistant United States Attorney or other agent of the government. For, as a Congress consisting largely of lawyers was well aware when it adopted the Jencks Act, a prosecuting attorney will ordinarily conduct interviews with prospective witnesses and make notes thereof. See 103 Cong. Rec. 15931 (85th Cong., 1st Sess., 1957).[17] Nor is it likely that all interview notes

[17] In the courts below the government vigorously contended that notes taken by an Assistant United States Attorney were excluded from the coverage of the Jencks Act. This question has been resolved against the government by both lower courts in the instant case (App. 8a, 200 F. Supp. at 715), as well as by the Court of Appeals for the District of Columbia Circuit in Justice Reed's recent opinion in *Saunders* v. *United States*, *supra*. The question is plainly one of great importance both to the government and defendants; the government presumably may seek to raise it, if certiorari should be granted, as a separate basis for sustaining the decision below.

taken by investigative agents are deemed worthy of transcription into typewritten form.

The extensive handwritten interview notes in the instant record (1829a-1913a) afford a sufficient basis for consideration by this Court of the standards which should govern producibility of longhand interview notes under the Jencks Act. The *Palermo* opinion, on which the court below relied, does not come to grips with the problem of interview notes, since a very different type of document was there involved. That document "was made from memory by one of the agents . . . . it was merely a summary of the agent's recollection of what had transpired at the meeting . . . . It does not appear that the memorandum was a transcript of notes taken during the interview . . . ." *United States* v. *Palermo*, 258 F. 2d 397, 399 (2d Cir. 1958); see Brief for the United States, p. 21, in *Palermo*, No. 471, Oct. T. 1958. In *Palermo* this Court held:

> ". . . that *summaries* of an oral statement which evidence substantial selection of material, or which were prepared after the interview *without the aid of complete notes*, and hence rest on the memory of the agent, are not to be produced. Neither, of course, are statements which contain the agent's interpretations or impressions." 360 U.S. at 352-53 (emphasis supplied).

The instant case, by contrast, confronts the Court with the "complete notes" taken by the agent during the interview. Such contemporaneous notes, unlike a post-interview report, do not "rest on the memory of the agent". The standards established by *Palermo* respecting summaries based on agents' post-interview recollection do not afford a ready formula for deter-

mining producibility of the agents' contemporaneously recorded interview notes.

Petitioner asks that this Court rule whether the "complete notes" of a government interviewer come within § 3500(e)(2) where, as here, they contain "in substance what the witness said". 200 F. Supp. at 715. The appropriate test, petitioner submits, should not exalt the form of the agent's recording over its substance; it should not depend upon adoption of the witness' grammar or particular phraseology. An agent for his own purposes will ordinarily record the substance of a witness' remarks. He ought not to be accorded an open invitation to insulate his recording from production to the defense by his testimony—ordinarily irrebuttable—that he rephrased the witness' words, or omitted portions not essential to the substance of what the witness said. Rather, where a law enforcement officer or prosecutor finds it adequate for his own use to record the substance of a witness' statement, such recording should likewise be deemed adequate for the use of the defense.

Any definition of "substantially verbatim" that makes its touchstone the wording rather than the substance of the recording will invite emasculation of § 3500(e)(2). An apt example is afforded by the testimony on a Jencks voir dire hearing in the recent trial of *United States* v. *Garfield*, 61 Cr. 671 (S.D.N.Y. 1962). A Justice Department attorney was there examined with respect to the producibility of interview notes which he had previously taken while serving as an Assistant United States Attorney for the Southern District of New York. The government attorney testified that his notes of interviews with the witness "do

reflect the substance of what he said . . . ." *Id.*, trial transcript at 2318. But professedly in order to "avoid . . . but not to evade" the Jencks Act, the attorney further testified, he would as a matter of policy refrain from using the exact words of the witness in taking his notes. *Id.* at 2374-75.[18] This manner of note-taking was attributed by the attorney to "my experience as an Assistant United States Attorney". *Id.* at 2375, 2383. He had admittedly developed the habit of rephrasing in his own words what the witness had said for the purpose of avoiding the Jencks statute. *Id.* at 2382-83.[19] The purpose was achieved, for the district

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[18] "Q. [by defense counsel, Mr. Berman] I believe you stated, and correct me if I am wrong, Mr. Shaffer—it has been some time since the last question—that it was not the policy to use the exact words of the witness you were interviewing. Is that correct?

A. Yes, that is correct.

Q. Then do I take it that it was the policy then to deliberately change the words that he used, so that the words would be your expression rather than his.

Mr. Walpin [prosecutor]: Objection.

The Court: I will permit Mr. Berman to question this witness as to whether there was any deliberate policy.

A. I would say it is not a deliberate policy, but it was a fact.

* * * *

Q. Are you saying that it was not a fact that it was deliberately designed for the purpose of not using the words of the witness?

A. I think that there was no deliberate design, but because of my experience as an Assistant United States Attorney and in interviewing people, it has always been my habit, because of the Jencks statute, to avoid it where possible but not to evade it."

[19] "Q. And that, basically, what you would do would be to write in your own words, just rephrase what it was he had told you or parts of what he had told you?

A. That is right.

Q. And that your purpose in doing this, if I understood you correctly, was to avoid the implications of the Jencks Act, so that

court concluded that the interview notes "were not substantially verbatim recordations of what the witness said." *Id.* at 2414.[20] The court added that, "the candid statement frankly uttered by the witness about his experience as an Assistant United States Attorney and his habit of note-taking does not indicate intent to subvert the Jencks Act." *Ibid.* Petitioner submits that, regardless of any government agent's subjective "intent to subvert the Jencks Act", such a result will in fact be accomplished if "substantially verbatim" is not defined to include notes which contain "in substance what the witness said".

Petitioner's position, that a competent interviewer's notes should ordinarily be producible in the form he records them, finds support in both the *Jencks* decision and the legislative history of § 3500. In *Jencks* v. *United States*, 353 U.S. 657, 668 (1957), the Court directed production of a witness' oral statements "as recorded by the F.B.I."—or as *Palermo* phrased it, "as recorded by agents of the Government." 360 U.S. at 345-46. In the Senate, subsection (e)(2) of the

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this would not be considered to be a statement in your opinion of what he had told you? Is that correct?

Mr. Walpin: Objection, your Honor.

The Court: Well, I will permit the witness to testify what his purpose was, if he had a purpose.

A. Well, as I testified before, the notes were taken according to the way I stated. As to whether I had a present intent at that point to avoid the Jencks statute, as you say, I cannot testify, but I can testify that because of my previous experience as an assistant I had come into the habit of note-taking with witnesses which was much this way and that I continued that note-taking.

Q. Didn't you use the words before that you did this to avoid, not evade, the Jencks statute?

A. Not this, but I developed the habit for that purpose."

[20] The example is unlikely to be an isolated one, since the interviews in question had been conducted under the personal supervision of a special assistant to the Attorney General (*id.* at 2436).

conference bill was explained to include recordings containing "not the agent's own comments or a recording of his own ideas, but a substantially verbatim recital of an oral statement which the witness has made to him, and *as transcribed by him* . . . ." 103 Cong. Rec. 16488 (85th Cong., 1st Sess., 1957) (emphasis supplied); quoted in Appendix B to the opinion in *Palermo, supra*, at 359, and in Brief for the United States, p. 38, in *Campbell*.

In the instant case, by contrast, petitioner has been denied the contents of extensive interview notes as transcribed by Assistant United States Attorney Shaw. The result has been cited by Judge Clark of the court below as calling for corrective action by this Court.

> "We seem generally unwilling to upset convictions when the Jencks Act, 18 U.S.C. § 3500, has not been scrupulously observed by the prosecution and the trial court. This tendency is disturbing. Several doctrinal devices have been developed to this end, such as that enunciated in . . . *United States* v. *Aviles*, 2 Cir., March 8, 1963, that the defense is not entitled to statements not sufficiently exact, though to the district judge 'probably verbatim,' recitals of the witness's oral statements. By employing one or more of these doctrinal devices the court is enabled to affirm an appealed conviction. Nevertheless this means that the speculation of the trial court is again being substituted for the judgment of defense counsel in assessing a statement's worth as an aid to cross-examination. It is this very evil which the Supreme Court has continually repudiated. See *Scales* v. *United States*, 367 U.S. 203, 258; *Palermo* v. *United States*, 360 U.S. 343, 346; *Jencks* v. *United States*, 353 U.S. 657, 668-669. But these doctrinal devices for achieving affirmance in the face of Jencks Act noncompliances are sufficiently entrenched that exception should not be made in individual cases and correction must come from

the Supreme Court." *United States* v. *Cardillo*, No. 365, Sept. T. 1961 (2d Cir. April 24, 1963) (concurring opinion).

3. The instant case presents an important question, apparently left open by *Palermo*, as to whether the interviewer's omission of part of the interview renders his notes or report of the balance unproducible.

> "The summary in this case does not present the question whether the statute requires the production of a statement which records part of but not the entire interview between the witness and the government agent. This is a problem which also should be left to the development of the interpretive case law, and in fact I do not read the Court's opinion as essaying a definitive answer .... Since, as the Court's opinion concedes, statements made up from interviewer's notes are not *per se* unproducible, one would suppose that a summary, part of which gave a substantial verbatim account of part of the interview, would, as to that part, be producible under the statute." *Palermo, supra*, at 364-65 (concurring opinion) (footnote omitted).

Longhand interview notes, taken by a capable investigator or attorney, will ordinarily, like the notes in *Campbell*, be

> "... 'complete ... with respect to the pertinent information' given by [the witness], although not a complete word-for-word transcription of what he had said." *Campbell* at 2.

Whether notes of this character are to be producible under the Jencks Act—in the absence of the witness' signature or specific approval, such as was found in *Campbell*—is an issue of far-reaching consequence meriting consideration by this Court. The court below had previously left open a like question: whether a statement, to qualify as "substantially verbatim", "re-

quires not only correctness but a completeness that would include the immaterial and the trivial as well as the pertinent." *United States* v. *Annunziato*, 293 F. 2d 373, 381 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961). The question apparently was answered in the instant case, by holding notes unproducible where the court found, from the interviewer's affidavit, that his notes "did not record the testimony that he thought was 'incoherent, illogical or in conflict with what the assistant then knew to be the fact from other witnesses.'" (App. 11a; see 1815a.)[21]

Petitioner submits that a statement's producibility should not be determined by a mathematical ratio between words recorded and time consumed by the interview. Omission of "the immaterial and the trivial" should not deprive the defendant of that which is material and significant. It may be doubted whether there is any interview devoid of all trivialities or immaterial pleasantries. Certainly there will be few such interviews if the interviewer knows that he can avoid production of his notes by the simple expedient of injecting a question about the weather or the interviewee's disposition. *Cf.* Note, *The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 181 (1959) ("Seemingly, all an agent need do is selectively summarize the witness' remarks, or add to them some ideas of his

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[21] The court also found the notes selective on the ground that "They are not as voluminous as they would be if they were complete transcriptions of Shaw's 20 to 30 interviews with Cantellops." (App. 11a.) But this is fallacious reasoning, for such a comparison proves nothing as to the completeness of the notes taken at any single interview. Since Shaw did not testify as to what was said or what notes were taken at any particular interview, the court could not possibly find that the 85 pages of notes (1829a-1913a) did not include complete transcriptions of certain of the 20 or 30 interviews, while recording others partially or not at all. Moreover, Shaw never testified that the notes which were produced included all the interview notes which he had taken (*cf.* 1779a).

own, and the resulting memorandum is effectively placed beyond production").

The paradox of allowing omission of irrelevant material to bar production of that which is relevant is heightened by the effect of 18 U.S.C. § 3500(c). By virtue of that subsection, any material recorded by the interviewer which does not relate to the witness' direct examination is to be excised from the interview notes before they are produced to the defense. Why then should the defense be deprived of the entire statement because irrelevant material, instead of being excised, was never recorded in the first place? At the least, petitioner contends, the qualification of a statement as "substantially verbatim" should not be affected by the interviewer's omission of material which would be excisable under § 3500(c). The instant record (including the Shaw affidavit) does not show that any material omitted by the interviewer Shaw did relate to Cantellops' direct testimony at trial. On the contrary, Shaw emphasized that his conversations with Cantellops often bore no relation to the subject matter of the case. "I would say that on every single occasion some time was spent in discussing matters completely extraneous to the case." (1632a.)[22]

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[22] "Q. But on each occasion you made notes? A. Yes—well, let me withdraw that. On some occasion no notes were taken because nothing was discussed.

Q. But I am talking about during interviews. You discussed the case didn't you? A. During the entire course of the interview?

Q. No, Mr. Shaw. When you had an interview with Mr. Cantellops, you discussed the case, did you not? A. Not necessarily.

Q. You did not. You discussed other matters? A. On many occasions we discussed other matters.

Q. Of the 30 occasions when you interviewed him, how many times did you discuss things other than the case? A. I would say that on every single occasion some time was spent in discussing matters completely extraneous to the case." (1632a.)

The object of *Palermo* was to prevent unfair impeachment. Since the material available for impeachment is the same whether the irrelevancies have been excised by the court under § 3500(c) or by the interviewer through his omissions, impeachment can be no less fair in the latter case than in the former.

> "Certainly a statement can be most useful for impeachment even though it does not exhaust all that was said upon the occasion. We must not forget that when confronted with his prior statement upon cross-examination the witness always has the opportunity to offer an explanation. The statute is to be given a reasonable construction, and the courts must not lose sight of the fact that the statute regulates *production* of material for possible use in cross-examination, and does not regulate *admissibility* into evidence—as the Court properly observes." *Palermo, supra,* at 365 (concurring opinion).

The result in the instant case is particularly difficult to square with the *Palermo* objective. For here the material assertedly omitted—statements which were incoherent, illogical, or demonstrably false—would obviously have increased the impeaching effect of the recording rather than rehabilitated the witness. It is quixotic to deprive petitioner of recorded material damaging to the witness' credibility because the Assistant United States Attorney determined not to record other material which would have been even more damaging.

4. Quite apart from the question whether the court of appeals applied § 3500(e)(2) correctly to the withheld Shaw notes, its decision should be reversed upon the authority of this Court's subsequent holding in

Brady v. *Maryland*, No. 490, Oct. T. 1962, 31 U. S. LAW WK. 4435, 4436 (May 13, 1963):

> "We now hold that *the suppression by the prosecution of evidence favorable to an accused upon request* violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.
>
> ". . . *A prosecution that withholds evidence on demand of an accused* which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant." (Emphasis supplied.)

The court of appeals here held that the defense had properly requested under the Jencks Act the interview notes which the government unilaterally withheld from the trial court (App. 7a-8a). But, while concurring in the district court's "disapproval of the government's reprehensible actions" in withholding the notes (see n. 11, *supra*), the appellate court found that the notes did not contain any producible statements (App. 11a). The government may thus argue that the documents requested and withheld were not "material" within the meaning of *Brady*.

The test of materiality adopted in *Brady* was whether *the trial court* would have permitted the jury to consider the withheld document on the question of guilt. See 31 U. S. LAW WK. at 4437. Under that test reversal would be required here, for Judge Murphy expressly found that under "the same standard applied by the trial court" to the interview notes, "the great majority of them are probably Jencks 'statements' and that a *voir dire* by the trial judge *would have resulted in the government being ordered to turn them*

over to defense counsel." 200 F. Supp. at 715-16 (emphasis supplied). The appellate court, by contrast, made no finding on whether the notes would have been held producible at trial under "the same standard applied by the trial court". Instead it apparently assumed that, if the government had submitted Shaw's notes to the trial court, the latter would have reached the same conclusion on producibility as the court of appeals (see App. 11a). Yet the appellate court's own conclusion as to producibility was rested solely on the authority of the *Palermo* opinion, which had not even been rendered at the time this case was tried.

The correctness of Judge Murphy's conclusion that the trial court would have ordered production of Shaw's notes under § 3500, is readily apparent from the rulings at trial upon the producibility of those statements of Cantellops which the government did submit to the trial court.[23] *E.g.*, the trial court held "substantially verbatim" a paragraph of an agent's report as to which the testimony was as follows:

> "Q. [by the court] Now does paragraph 3 of this report constitute substantially a verbatim report of a conversation that you had with the witness Nelson Silva Cantellops?
>
> "A. [by agent Rowan] That, sir, is *a synopsis and it is in my own words.* It is a report to the Bureau. *It reflects what he told me on many occasions.* It was necessary to submit a status report

[23] The 14 excerpts from agent's reports which the trial judge ruled were "substantially verbatim" statements of the witness Cantellops are printed at pp. 1a-16a of the appendix to the petition for rehearing below. The trial court's voir dire examinations and rulings on the producibility of Cantellops' statements appear in the trial transcript at Tr. 2013-2058, 3159-3174.

in my own words." (Tr. 3167, emphasis supplied; see also Tr. 3173.)[24]

Another report of some 375 words (R. 9a-10a) was found "substantially verbatim", where the agent testified that he prepared it within a day of the interview but that during the interview he had made no notes except perhaps of several names and figures (Tr. 2021). According to government counsel below, at trial "the Court satisfied itself that any statements, in whatever form, provided the information emanated from Cantellops, was turned over to the defense" (888a).[25]

Thus, assuming *arguendo* the correctness of the present appellate ruling that Shaw's notes were not producible, it is clear that a ruling on the notes at trial would have been less favorable to the government. Impeaching statements in the Shaw notes would have been

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[24] The paragraph held "substantially verbatim" read:

"3. In addition to his dealings with RALPH POLIZZANO, JOHN DOE @ JUNIOR, now identified as SALVATORE MARINO, JACK RUSSO, ROSARIO COLLETTI, and other Italians operating out of the SQUEEZ-INN BAR, 87 E. 4th St.; previously reported, CANTELLOPS revealed that he has had dealings with other important Italian sources of supply JOSEPH DI PALERMO @ JOE BECK, IL #73A, CHARLES BARCELONA, CARMINE POLIZANO, JOHN ORMENTO @ BIG JOHN, IL #253, and a non-Italian, BENJAMIN LEVINE. A considerable number of his illegal activities with these individuals involve trips to Miami and Key West, Florida, for the purpose of bringing narcotics to New York City. Other trips were made to Las Vegas, Chicago and Cleveland, for the purpose of delivering narcotics. The period of time covered by these illegitimate activities goes from March, 1955, to July, 1957." (R. 15a.)

[25] Judge Bicks stated, in describing his trial rulings:

"... [T]he record demonstrates that the Court was exceedingly generous even to the point of going beyond the mere letter of the Jencks Act." 197 F. Supp. at 558.

produced to the defense but for the government's unilateral determination to withhold the notes from the trial court. The decision below permits the prosecution to profit from its own wrongdoing in withholding the requested statements, and is contrary to the doctrine of *Brady* v. *Maryland, supra.*

5. The fifth of the questions here presented again involves an issue raised but not reached in *Campbell:* the effect of an agent's destruction of his interview notes. In *Campbell* I this Court had left open the "important question" of whether all such destruction, or only bad faith destruction, calls for the sanctions authorized by 18 U.S.C. § 3500(d):

> "The parties argue whether destruction may be regarded as the equivalent of non-compliance with an order to produce under that subsection. The Government contends that only destruction for improper motives or in bad faith should be so regarded. The petitioners contend that destruction without regard to the circumstances should be so regarded. However, this record affords us no opportunity to decide this important question of the construction of subsection (d). We do not yet know that such a paper existed, and was destroyed, or the circumstances of its destruction, nor can we know without the benefit at least of [the agent's] testimony." 365 U.S. at 98. See also *Campbell* at 2, n. 2 and 4, n. 5.

The instant record does afford the "opportunity to decide this important question of the construction of subsection (d)" which was not reached in *Campbell.* The Court here has the benefit of three different agents' testimony as to the circumstances of their destruction of interview notes; and this testimony presents both the good faith and bad faith situations. Narcotics agent Rowan has testified that he destroyed his notes in order "[t]o circumvent the Jencks deci-

sion" (916a, see also 1137a, 1146a). Agents Consoli and Muglia, on the other hand, have each testified that they destroyed their notes only because these were no longer needed for investigative purposes (see 826a, 902a; 1361a-63a, 1375a-77a).

Of the two alternatives left open by this Court in *Campbell* I, the lower courts in this case adopted that requiring bad faith destruction. 197 F. Supp. at 555-56; App. 3a (affirming on the opinion below). Petitioner urges that this Court consider adoption of the stricter of the *Campbell* alternatives, holding intentional destruction violative of Jencks Act rights regardless of the government's good faith. The recent decision in *Brady* v. *Maryland, supra,* suggests by analogy that good faith should not be the test employed. *Brady* held that the prosecution's suppression of requested evidence violates due process "irrespective of the good faith or bad faith of the prosecution." 31 U. S. LAW WK. at 4436. Destruction of notes potentially producible as evidence impeaching a prosecution witness, before such notes can be requested, is arguably a similar due process violation. An appropriate sanction to deter such destruction may, however, be provided without reaching the constitutional question by the statutory interpretation of § 3500(d) in accordance with the stricter alternative left open in *Campbell* I at 98, and in *Campbell* at 4, n. 5.

The routine destruction of agent Consoli's and agent Muglia's notes presents essentially the same situation before the Court in *Campbell.* The destruction of agent Rowan's notes raises the question whether § 3500(d) sanctions should be imposed where the agent has admitted that the destruction of his notes was for the purpose of preventing production under *Jencks.*

Petitioner submits that such a purpose should be held as a matter of law to entail "improper motives" or "bad faith". *Compare People* v. *Betts*, 272 App. Div. 737, 74 N.Y.S. 2d 791 (1st Dept. 1947), *affirmed*, 297 N.Y. 1000 (1948), holding that a police officer's destruction of his notes to avoid cross-examination entailed "bad faith" as a matter of law, despite the finding that the officer had acted in subjective good faith. Although the district court herein made adverse findings as to agent Rowan's credibility at the new trial hearing, 197 F. Supp. at 555-57,[26] the fact that he destroyed his notes remains uncontroverted. Former Assistant United States Attorney Shaw, whose testimony regarding Rowan was accepted by Judge Bicks, testified that his own file contained handwritten notes of Rowan, comprising approximately one-tenth as many pages as his own (see *id.* at 557; 1637a).[27] The

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[26] The appraisal of Rowan's credibility should be assessed in the light of the attitude manifested toward the witness in the court's very extensive intervention in his questioning (see especially 1203a-24a). *E.g.*, the court repeatedly asked Rowan whether his conduct had not been "foolish" or "foolishness" (see 1204a, 1205a, 1206a, 1220a, 1222a, 1223a, 1224a, 1228a, 1234a); the court invited Rowan to "unburden" himself of any "lies" in his testimony (1206a); the court suggested that Rowan might invoke the Fifth Amendment rather than admit improper conduct, and ordered stricken Rowan's response to the effect that he did not invoke the Amendment because he was not blameworthy (see 921a-23a). By contrast, the court at trial indicated no doubts as to Rowan's credibility and described him as a "very intelligent" witness (Tr. 3171).

[27] Shaw further testified that Rowan's notes were written on every line while Shaw's were written on every other line; and that he was not sure whether Rowan's notes, unlike his own, were written on both sides of the page (1641a). Thus the content of the Rowan notes in Shaw's file would be approximately one-fifth or two-fifths (depending upon whether Rowan wrote on both sides of the page) that of Shaw's notes, containing the equivalent of some 17 to 34 pages of the latter (1829a-1913a).

Rowan notes in Shaw's file have never been produced by the government, and must therefore be presumed destroyed. This accords with the unchallenged testimony of agent Rowan at the original trial, that "I had notes on a vast amount of information that he [Cantellops] had given me" but that such notes were no longer in existence (Tr. 3161, 3170; 197 F. Supp. at 554, n. 19a).

Thus at the least the record establishes that Rowan took a considerable volume of interview notes,[28] that such notes no longer exist, and that the agent's avowed explanation for their destruction was to circumvent *Jencks*. Even if the avowal of purpose be disregarded because of the district court's appraisal of Rowan's credibility, the record remains devoid of affirmative testimony that Rowan destroyed the notes in good faith. If the burden be upon the government to demonstrate good faith where potentially producible notes have been destroyed, that burden was not sustained in this case.

Petitioner submits that, if the Court should adopt the rule that good faith destruction entails no sanctions under § 3500(d), the Court should nevertheless hold that the burden of establishing such good faith rests upon the government. This would accord with the rule as to burden of proof stated in *Campbell* I, at 96. In resolving questions of good faith destruction under § 3500, the rule governing allocation of the

[28] The four excerpts ordered produced at trial from typewritten reports of agent Rowan (R. 13a-16a) are much too brief to comprise the entire contents of Rowan's many pages of notes. However, the production of these excerpts is significant in that it reflects a finding that Rowan was capable of recording Cantellops "substantially verbatim", thus leaving no basis for inferring that the notes which were destroyed contained no "substantially verbatim" statements.

burden of proof will be of critical significance, and should be determined by this Court.

6. Judge Bicks, in passing upon defendants' new trial motions, reserved decision "to the extent that these motions for a new trial are based upon the aforesaid papers of Assistant United States Attorney Shaw . . . ." 197 F. Supp. at 559. Insofar as the grounds passed upon by Judge Bicks were concerned, the court of appeals affirmed "the order below on the careful opinion of Judge Bicks" (App. 3a). The appellate court disregarded the possibility that Judge Bicks' decision on those grounds might have been altered by the subsequently produced Shaw notes, on whose significance he had reserved decision. Presumably it deemed its holding that the Shaw notes were not producible under § 3500 to bar their consideration upon the remaining grounds of the motion.

Question six is included in this petition so that, if Shaw's notes are held producible but it is not determined that their withholding prejudiced the defense at trial, the case may be remanded to the district court for consideration of the notes (and of evidentiary leads deriving therefrom) as further evidence on the first five grounds of the new trial motion. Petitioner submits that the notes contain significant information pertinent to such grounds which should be evaluated by the district court. *E.g.*, ground three of the motion was concerned with allegedly false testimony of Cantellops regarding his Las Vegas trip. Judge Bicks ruled that "The only demonstrably false trial testimony of Cantellops with respect to the Las Vegas trip" was insufficient to warrant a new trial. 197 F. Supp. at 548-49. But the subsequently disclosed Shaw notes "contained materially false versions of two of

Cantellops' trips, one to Las Vegas and one to Miami . . . ." 200 F. Supp. at 716. The notes might accordingly be used to persuade the district court that Cantellops gave other false trial testimony regarding the Las Vegas trip.

Question six is included for the further reason that, even if the ruling stands that Shaw's notes were not producible under § 3500, petitioner contends that on remand the notes should be considered as evidence on other grounds of the new trial motion. *Cf. United States* v. *Flynn*, 130 F. Supp. 412 (S.D.N.Y. 1955), and *United States* v. *Miller*, 61 F. Supp. 919 (S.D.N.Y. 1945), both granting new trials partly on the basis of newly discovered pre-trial statements to the government contradicting the witness' trial testimony. Although *Palermo* held § 3500 exclusive as to production for purposes of impeachment at trial, this should not bar statements outside the statute from use as substantive evidence for defendants, especially on a post-trial motion.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APPENDIX A

Opinion

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 66—October Term, 1962

(Argued December 18, 1962 Decided March 8, 1963)

Docket No. 27377

UNITED STATES OF AMERICA, *Appellee*,

v.

ALFREDO AVILES, CHARLES BARCELLONA, CHARLES DI PALERMO, JOSEPH DI PALERMO, NATALE EVOLA, VITO GENOVESE, VINCENT GIGANTE, DANIEL LESSA, NICHOLAS LESSA, ROCCO MAZZI, CARMINE POLIZZANO, RALPH POLIZZANO and SALVATORE SANTORA, *Defendants-Appellants*.

Before:

WATERMAN, MOORE and MARSHALL, *Circuit Judges*.

Consolidated appeals from denials of appellants' motions for a new trial, United States District Court for the Southern District of New York, Bicks, *J.*, and Murphy, *J.*, pursuant to Rule 33, Fed. R. Crim. P. Affirmed.

VINCENT L. BRODERICK, United States Attorney, Southern District of New York (ARNOLD N. ENKER, ARTHUR I. ROSETT, RICHARD A. GIVENS, Asst. United States Attorneys, of counsel), *for appellee.*

ROY L. REARDON, New York City, *for appellant Barcellona.*

ALBERT J. KRIEGER, *for appellants Joseph Di Palermo, and Charles Di Palermo.*

MAURICE EDELBAUM, New York City, *for appellant Evola.*

EDWARD BENNETT WILLIAMS, Washington, D. C.; ROBERT L. WEINBERG, Washington, D. C.; WILFRED L. DAVIS, New York City, *for appellant Genovese.*

WILFRED L. DAVIS, New York City, *for appellant Gigante.*

HENRY K. CHAPMAN, New York City, *for appellants Nicholas Lessa and Rocco Mazzi.*

ALLEN S. STIM, New York City, *for appellant Ralph Polizzano.*

HERBERT S. SIEGAL, *for appellant Santora.*

WATERMAN, *Circuit Judge:*

After a three months' jury trial in the Southern District of New York, appellants were convicted, on April 17, 1959, of conspiracy to violate federal narcotic laws, 21 U. S. C. §§ 173, 174. Their convictions were affirmed on appeal to this court, 274 F. 2d 179, and the Supreme Court denied certiorari, 362 U. S. 974, 982, *rehearing denied*, 363 U. S. 858.

On August 26, 1960, appellants moved in the district court for a new trial, Rule 33, Fed. R. Crim. P., and put forth, as grounds for their motions: (1) alleged recantations of trial testimony by the principal government witness, Nelson Cantellops; (2) statements by Cantellops at the hearing on the motions for a new trial which were allegedly

inconsistent with his original testimony; (3) allegedly new extrinsic evidence tending to establish Cantellops' perjury in his trial testimony concerning a certain trip to Las Vegas, Nevada; (4) alleged concealment at the trial of a rent record in the possession of the Government; (5) alleged post trial statements by Cantellops which tended to discredit his trial testimony; (6) alleged spoliation of notes of federal Narcotics Agents Rowan, Consoli, and Muglia, in violation of the Jencks Act, 18 U. S. C. § 3500; and (7) failure of the Government to make available to the trial court certain interview notes of Assistant United States Attorney Donald H. Shaw, which notes were allegedly producible under the Jencks Act, 18 U. S. C. § 3500.

After extended hearings, Judge Bicks, who had presided at the original trial, denied appellants' motions insofar as they rested upon grounds 1 through 6 set forth above. 197 F. Supp. 536. He reserved decision with respect to the Shaw interview notes, indicating his intention to take further testimony regarding this issue. Due to the illness of Judge Bicks, however, the contemplated voir dire examination was not held. Judge Murphy was subsequently assigned to conduct the hearing and make a determination as to the ground upon which Judge Bicks had reserved decision. On December 22, 1961, Judge Murphy denied the motions for a new trial. 200 F. Supp. 711.

From these orders below adverse to them appellants now prosecute this consolidated appeal claiming that the grounds set forth above are individually and collectively sufficient to entitle them to a new trial under Rule 33, Fed. R. Crim. P. As to the grounds 1 through 6 set forth above, we affirm the order below on the careful opinion of Judge Bicks. As to the Shaw interview notes, we affirm the order of denial below for the reasons set forth hereafter.

During the course of the original trial, defense counsel inquired, following the direct examination of the Govern-

ment's principal witness, Nelson Cantellops, whether the United States Attorney had in his possession

> "any report or memorandum prepared by a government agent concerning any interview that was conducted with [Cantellops] at any time, under the Jencks decision and under 3500."

The Government subsequently made available to the court what were represented to be "the complete files of the Bureau of Narcotics" on Nelson Cantellops. No interview notes of Assistant United States Attorney Shaw were included in these materials, and, despite the fact that prior testimony indicated extensive questioning of Cantellops by Shaw, defense counsel made no further request for, nor objection to the nonproduction of, any Shaw notes still in existence.

Specific requests and objections relative to the Shaw notes were not made by counsel for appellants until the hearings below on the motions for a new trial. During the course of these hearings Shaw himself testified concerning notes he had taken of some 20 to 30 interviews with Cantellops, and of a "chronological statement of facts," prepared from these notes and other sources, concerning Cantellops' involvement in the alleged conspiracy.

Upon demand by counsel for appellants, the Government produced for Judge Murphy's *in camera* inspection two envelopes labeled, respectively, "Former Assistant U. S. Attorney Shaw's Chronology" and "Original Notes and Assorted Miscellany of Former Assistant U. S. Attorney Shaw."

In ruling on appellants' motions, Judge Murphy separated the Shaw materials into three groups:

(1) Materials which were not "substantially verbatim recitals" of Cantellops' statements. Into this group were placed Shaw's "chronology of facts," together with certain

of Shaw's "original notes and assorted miscellany." Ruling that these materials would not have been found producible under 18 U. S. C. § 3500 had then been made available for the court's inspection during the original trial, Judge Murphy concluded that their nonproduction was not prejudicial to appellants' interests. See *Rosenberg* v. *United States*, 360 U. S. 367, 370 (1959). We cannot say that Judge Murphy's findings with respect to these materials were clearly erroneous.

(2) Materials which were "probably Jencks' statements." Judge Murphy ruled that the nonproduction of this second group of materials, into which was placed "the great majority" of Shaw's original interview notes, was nonprejudicial to appellants on the ground that "virtually the[ir] entire contents" "correspond[ed] with the grand jury testimony of Cantellops which was turned over to the defense."

(3) Notes which "most assuredly should have been produced pursuant to § 3500." This group consisted of handwritten interview notes dated October 10 and 11, 1957. Although these notes contained new impeaching information not otherwise available to appellants, Judge Murphy ruled that nonproduction of these notes did not prejudice defendants' interests, in that defendants' cross-examination of Cantellops was not "unduly restricted" thereby:

> "* * * this witness was subjected to a most complete and searching cross-examination by able and experienced counsel during a period of 14 trial days, in the course of which his character and credibility were thoroughly explored and devastatingly attacked. The facts of his considerable prior criminal activities, his affiction with a loathsome disease, his immorality, his perjuries and his motive to misrepresent were all paraded before the jury without quarter. To be able with the use of the October notes to show that Cantellops spoke untruthfully on yet another occa-

> sion * * * would simply add umber to an already blackened witness." 200 F. Supp. at 717.

Appellants now vigorously contend that in so ruling with respect to the second two groups of Shaw materials, Judge Murphy misapplied the test of harmless error laid down in *Rosenberg* v. *United States, supra,* and *United States* v. *Consolidated Laundries Corp.*, 291 F. 2d 563 (2 Cir. 1961).

The Government argues, for its part, as it did below, first, that appellants waived all right to object to the nonproduction of the Shaw materials by their failure to demand these materials, or to object to their nonproduction, at trial; second, that the materials constituted an attorney's work product, and as such were not producible under 18 U. S. C. § 3500; third, that the materials were neither statements of a witness, nor substantially verbatim recitals of such statements, and, for this reason, were not producible under the Jencks Act, 18 U. S. C. § 3500.

Because of our disposition of the Government's contentions, we do not reach the issue of harmless error from which appellants direct their major attack upon the order of Judge Murphy below.

We consider, first, the Government's suggestion that appellants are precluded from objecting to the nonproduction of the Shaw materials by failure properly to demand the materials, or to object to their nonproduction, at trial.

After the direct examination of Nelson Cantellops at the original trial, defense counsel asked, as indicated above, whether the United States Attorney had in his possession

> "any report or memorandum prepared by a government agent concerning any interview that was conducted with this witness at any time, under the Jencks decision and under 3500."

The court thereupon directed that "any such statement" be made available to counsel.

Counsel for the Government subsequently stated in open court:

> "The United States Attorney's office has examined all the reports in this case and we find that there is no report which would fall within the ambit of Section 3500 and therefore need not be turned over to defense counsel."

When the court asked whether there was "any report whatever" that dealt with Nelson Cantellops, government counsel responded affirmatively, and Judge Bicks declared that he would examine those reports to determine whether they fell within Section 3500.

The Government now argues that defense counsel's request for "any report or memorandum prepared by a government agent" encompassed only reports of "Agents" of the Bureau of Narcotics, and not those of Assistant United States Attorneys, who, it is sought to have us believe, are not "government agents." Even if Shaw's materials were producible under the Jencks Act, the Government contends that, by their failure to make a timely demand, appellants are precluded from raising the issue upon this motion for a new trial.

Ours is an adversary system of criminal justice. It is not, however, a "game of verbal jackstraws," the object of which is to see whether the actions of either the Government or the defense can be pulled out from under the language of applicable statutes, the demands of opposing counsel, or the orders of the court, without disturbing any of the latter. Cf. Llewellyn, Jurisprudence 445 (1962). By enacting the Jencks Statute, 18 U. S. C. § 3500, Congress provided criminal defendants with a sharply circumscribed, but nonetheless important, right to obtain information from

the prosecution in criminal proceedings. To utilize that right, defense counsel must proceed with unusual diligence. Counsel is entitled to no statements of a government witness until the witness has testified on direct examination, yet the statement is unlikely to be of value unless it is secured and studied by counsel prior to cross-examination. Counsel must often frame requests under the Act with little or no information concerning the circumstances under which, or the agents to whom, the witness may have given producible statements. Moreover, defense counsel ordinarily has no basis upon which to object to government nonproduction of requested statements where unspecified materials are retained by the court following *in camera* inspection.

To these impediments to an effective invocation of Jencks Act rights by defendants in criminal cases the Government would now add the niceties of ancient common law pleading in the formulation of demands for producible statements. Of course the Act does not require that demands for statements must be of precise nicety, and we are unwilling to hold that such requests be couched in formal or technical language.

The Government further argues that the Shaw materials were the work product of an attorney and as such were not producible under 18 U. S. C. § 3500. In so arguing, the Government relies principally upon *Hickman* v. *Taylor*, 329 U. S. 495 (1947) and the public policy reflected therein. *Hickman* v. *Taylor*, however, was concerned solely with discovery in civil proceedings. The obtaining of statements of witnesses in the hands of the prosecution which the defense may use for impeachment purposes in criminal trials is made possible by the Jencks Act. That act makes no distinction among statements on the basis of the purpose for which they were recorded or the type of government agent to whom they were made. *Saunders* v. *United States*, — F. 2d — (D. C. Cir. 1963) (No. 17,122).

We are brought, finally, to the Government's contention, vigorously argued below and renewed on this appeal, that the Shaw interview notes were not "substantially verbatim recitals" of statements by Nelson Cantellops, and thus were not producible under the Jencks Act. If the Government's contention be upheld on this point, it follows that appellants' motions for a new trial were properly denied, insofar as they rested upon nonproduction of the Shaw materials. Appellants cannot have been prejudiced by the nonproduction of materials which, even had they been disclosed to the trial court for *in camera* inspection, would not have been found producible for defendants' use under the Act.

In ruling that the October 10 and 11 notes were Jencks "statements," and that the great majority of Shaw's other original interview notes were probably "verbatim recitals" within the Act's definition, Judge Murphy relied solely upon the notes themselves and upon the record of Shaw's earlier testimony before Judge Bicks. Judge Murphy conducted no voir dire examination of Shaw and received no testimony from any other witness prior to ruling upon this portion of appellants' motions.[1] As we have available to us all of the materials upon which Judge Murphy based his rulings, our conclusion with respect to this factual issue is entitled to no less weight than that of the Court below.

In determining whether the Shaw notes were "statements" within the Jencks Act definition of that term, 18 U. S. C. § 3500(e), the cases provide certain well-defined criteria to assist us. Such a statement must, of course, be "a substantially verbatim recital of an oral statement made

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[1] Judge Murphy was not, of course, required to conduct a voir dire examination of Shaw, or to hold any hearing whatever, before determining whether these disputed documents were within the Jencks Act. As the Supreme Court said in *Palermo* v. *United States*, 360 U.S. 343, 344-45 (1959), it is "the function of the trial judge to decide in the light of the circumstances of each case, what, if any, evidence extrinsic to the statement itself may or must be offered to prove the nature of the statement."

by [the] witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." 18 U. S. C. § 3500(e)(2). The statement must fairly be "the witness' own words." *Palermo* v. *United States*, 360 U. S. 343, 352 (1959). It must "reflect fully and without distortion what had been said to the government agent." Ibid. The distortion which Congress sought to avoid by its narrowly-drawn definition "can be the product of selectivity as well as the conscious or inadvertent infusion of the recorder's opinions or impressions." Thus, "a report which merely selects portions, albeit accurately, from a lengthy oral recital" will not be producible under the Act. Ibid.

In applying these criteria to the Shaw interview notes, we may consider, as did Judge Murphy, the general tenor of the notes themselves, Shaw's extensive testimony before Judge Bicks concerning the interviews and notes, and Shaw's affidavit, submitted to Judge Murphy in support of the Government's motion for reargument below and properly part of the record on this appeal.

Shaw testified at the post-trial hearing before Judge Bicks that he met with Cantellops 20 or 30 times over the course of almost a year. He testified that Cantellops spoke rapidly and in poor English, requiring that he "almost translate it and put it into a more recognizable form of English".[2] He stated that the notes were never read back to Cantellops, that Cantellops never signed or initialed them, and that only about one half of the notes contained information elicited from Cantellops, the remainder containing information coming from "close to a dozen differ-

[2] This testimony is supported by the testimony of Narcotics Agent Rowan before Judge Bicks that it was "impossible" for him to keep up with Cantellops' statements in his note-taking, and that Cantellops spoke rapidly, in bad English, ungrammatically and indistinctly. Judge Bicks, himself relying on his familiarity with Cantellops' testimony during the trial, indicates agreement with this characterization of Cantellops' speech habits. 197 F. Supp. at 557.

ent sources." Finally, Shaw testified that it was his practice to go over the notes after the interview and make additions to them, as the notes were taken not for the purpose of providing a record of Cantellops' testimony, but to assist Shaw in drafting the chronological statement and to serve as a guide in interrogating Cantellops before the grand jury.

Shaw's affidavit, submitted to Judge Murphy in support of the Government's motion for reargument, substantiates the foregoing, and adds that Shaw was selective in his note-taking and did not record the testimony that he thought was "incoherent, illogical or in conflict with what the assistant then knew to be the fact from other witnesses."

Finally, the documents themselves indicate that they are the result of a process of selection. They are not as voluminous as they would be if they were complete transcriptions of Shaw's 20 to 30 interviews with Cantellops. Further, the signs of addition and interpolation are evident on the face of the documents.

We hold, consequently, that the Shaw materials contained no statements which, had they been delivered to the trial court for *in camera* inspection, would have been found to be producible under the Jencks Act.[3] The orders of Judge Bicks and Judge Murphy, denying appellants' motions for a new trial, are, accordingly, affirmed.

---

[3] Our conclusion in this respect should not be read as a condonation of the Government's failure to deliver the Shaw materials to the trial court for *in camera* inspection. We fully concur in Judge Murphy's disapproval of the Government's reprehensible actions in this respect. 200 F. Supp. at 714. In *Palermo v. United States*, 360 U.S. 343, 354 (1959), the Supreme Court laid down the rule that even before that time was the practice in this circuit: "When it is doubtful whether the production of a particular statement is compelled by the statute, we approve the practice of having the Government submit the statement to the trial judge for an *in camera* determination. Indeed, any other procedure would be destructive of the statutory purpose."

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Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of March one thousand nine hundred and sixty-three.

Present: Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Thurgood Marshall, *Circuit Judges.*

United States of America, *Plaintiff-Appellee,*

v.

Alfredo Aviles, et al., *Defendants,*

Charles Barcelona, et al., *Defendants-Appellants.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are affirmed.

A. Daniel Fusaro
Clerk

A true copy,
A. Daniel Fusaro
Clerk

Letter Modifying Opinion

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Chambers of
Sterry R. Waterman
U.S. Circuit Judge
P.O. Box 178
St. Johnsbury, Vermont

March 19, 1963

A. Daniel Fusaro, Clerk
U. S. Court of Appeals, 2 Cir.
U. S. Court House
Foley Square
New York 7, N. Y.

Dear Mr. Fusaro; In re: Docket No. 27377
U.S. v. *Aviles, et al*

Will you please make the following change in the above opinion:

> On slip sheet 1354, footnote 3, please strike the second sentence and insert in lieu thereof: "See Judge Murphy's discussion, 200 F. Supp. at 714."

Thank you very much.

Sincerely,

/s/ STERRY R. WATERMAN
Sterry R. Waterman

A true copy,
A. DANIEL FUSARO
Clerk

Letter Modifying Opinion

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Chambers of
Sterry R. Waterman
U.S. Circuit Judge
U.S. Court House
New York 7, N.Y.

March 28, 1963

Memo to ADF

In re: Docket No. 27377
United States v. Aviles et al.

Dear Mr. Fusaro:

Will you please notify everyone who is entitled to be notified that the opinion in this case is modified by the deletion of the word "clearly" where it appears in the last line of subparagraph (1) on page 1347 of the slip sheets. Sentence will now read:

> "We cannot say that Judge Murphy's findings with respect to these materials were erroneous."

Sincerely,

/s/ STERRY R. WATERMAN
Sterry R. Waterman

Copy to West Pub. Co.

A true copy,
A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, *Appellee,*

v.

ALFREDO AVILES, ET AL., *Appellants.*

Denial of Petition for Rehearing

Edward Bennett Williams and Robert L. Weinberg, Washington, D. C. and Wilfred L. Davis, New York, N. Y., for appellant Vito Genovese.

Petition denied.

S. R. W.
L. P. M.
T. M.
U.S.C. JJ.

10 APR 1963

Denial of Petition for Rehearing In Banc

Edward Bennett Williams and Robert L. Weinberg, Washington, D. C. and Wilfred L. Davis, New York, N. Y., for appellant Vito Genovese.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

J. EDWARD LUMBARD
Chief Judge

10 APR 1963

APPENDIX B

Text of the Jencks Act, 18 U.S.C. § 3500:

§3500. Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event

the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 197

VINCENT GIGANTE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILFRED L. DAVIS
166 East 61st Street
New York, New York
Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

VINCENT GIGANTE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Vincent Gigante prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the orders of the United States District Court for the Southern District of New York denying petitioner's motion for a new trial.

OPINIONS BELOW

The opinion of the court of appeals is reported at 315 F. 2d 186, and is reported in part at 31 U. S. LAW WK. 2470. Appendix A to this petition prints the opinion as promulgated (App. 1a-11a) and the subsequent modifications (App. 13a, 14a). The opinions of the district court are reported at 197 F. Supp. 536 (per Judge Bicks) and at 200 F. Supp. 711 (per Judge Murphy).

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1963 (App. 12a). Rehearing and rehearing *in banc* were denied on April 10, 1963 (App. 15a). The time for filing of this petition was extended until June 8, 1963, by order of Associate Justice Harlan, entered on May 1, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED[1]

1. Whether the "clearly erroneous" standard, rather than review *de novo*, is applicable to review of district court *in camera* determinations of the producibility of statements under sub-section (e)(2) of the Jencks Act, 18 U.S.C. § 3500(e)(2).

2. Whether interview notes which are not entirely in the witness' own words but are found by the district court to "set forth in substance what the witness said", qualify as a "substantially verbatim recital" within the meaning of the Jencks Act, 18 U.S.C. § 3500 (e)(2).

---

[1] The questions presented are the same as those in the petition of petitioner Vito Genovese, who seeks a writ of certiorari from the same judgment below.

3. Whether a government agent's deliberate omission from his interview notes of statements made during periods of the interview when the witness says nothing helpful to the government, or nothing relating to the subject matter of his direct examination, precludes all notes taken during the remainder of the interview from qualifying as "substantially verbatim" under 18 U.S.C. § 3500(e)(2).

4. Whether petitioner's due process or Jencks Act rights were violated by the government's unilateral determination to withhold from the trial judge, after a proper defense request for Jencks materials, extensive interview notes taken by an Assistant United States Attorney, where such notes included statements which would have seriously impeached the testimony of the sole witness against petitioner and been producible under 18 U.S.C. § 3500(e)(2) as interpreted by the trial court.

5. Whether pre-trial destruction of a government agent's interview notes, arguably within 18 U.S.C. § 3500(e), warrants invocation of sanctions under § 3500(d) or otherwise:

(a) where the agent testifies that he destroyed his notes in accordance with regular practice;

(b) where the agent testifies that he destroyed his notes deliberately in order to circumvent the Jencks rule.

6. Whether, if petitioner does not receive a new trial on the basis of asserted Jencks Act violations, the case should be remanded to the district court for reconsideration of the remaining grounds of petitioner's new trial motion in the light of additional evidence first made available to the defense after the motion's denial.

STATUTE INVOLVED

The Jencks Act, 18 U.S.C. § 3500, is printed as Appendix B to this petition (App. 16a-17a).

STATEMENT

Undersigned counsel for petitioner Vincent Gigante is also co-counsel for petitioner Vito Genovese, who seeks review of the same judgment below.

The issues as to both petitioners are simliar and the same questions have been presented by each petitioner. To avoid repetition, petitioner Gigante respectfully adopts the reasons for granting the writ set forth in the petition of Genovese. Petitioner Gigante also adopts the statement of the case contained in the petition of Genovese, and adds the following information pertinent to the evidence concerning petitioner Gigante.

All of the evidence against Gigante was in the form of uncorroborated testimony of the witness Nelson Silva Cantellops. The trial court in its instructions to the jury stated:

> "We shall next consider the evidence relating to the petitioner Vincent Gigante. Only Cantellops testified with respect to him." (Tr. 1099a.)[2]

The principal part of such testimony dealt with an alleged automobile trip made by Cantellops and Gi-

---

[2] Record references herein are cited in the same manner as in the petition of Genovese:

Proceedings on the motion for new trial are cited to petitioner Genovese's appendix in the court of appeals (vols. I through IV). These citations have the suffix "a" and no prefix. Proceedings on the original trial are cited to the appendix to petitioner Genovese's brief on the appeal from conviction, which was rebound as a separate appendix volume to petitioner Genovese's brief on the instant appeal. These citations have the prefix "Tr." and the suffix "a".

gante to Lorain, Ohio, from which point Cantellops departed by bus for Cleveland, about a one hour's drive from Lorain, to deliver narcotics. (See Tr. 291a-93a.)

The only other evidence relating to Gigante placed him as the driver of the car in which Genovese and Cantellops proceeded up the West Side Highway to a meeting in defendant Mazzie's house in the Bronx (Tr. 338a-42a). Gigante did not attend any part of the meeting (Tr. 342a; *cf.* Tr. 350a). See *United States* v. *Aviles*, 274 F. 2d 179, 189 (2d Cir.), *cert. denied*, 362 U.S. 974, 982, *rehearing denied*, 363 U.S. 858 (1960). However, it was the evidence of Gigante's participation in the Lorain-Cleveland trip which provided the basis for the court of appeals' affirmance of his conviction. *Ibid.*

At trial Cantellops admitted that he had given the grand jury a different account of his Cleveland trip. According to that account, given in March of 1958, Cantellops had traveled from New York to Cleveland by bus, and Gigante was in no way involved.

> "Q. Did you ever swear before a jury or a grand jury, rather, a grand jury, that you took this trip by bus; yes or no? A. Yes, I reached Cleveland by bus.
>
> Q. If you will just listen to me: Did you ever swear before the grand jury that you made this Cleveland trip by Greyhound bus; yes or no? A. Yes.
>
> Q. Tell us the details of what you said to the grand jury about your trip by bus to Cleveland, when you testified about the Cleveland trip by bus—tell us what you told the grand jury, everything you told the grand jury about that trip to

Cleveland, and I will tell you the date, when I want you to do that.

Mr. Christy: Objection, your Honor.

The Court: Let us get the facts. Did you go by Greyhound bus?

The Witness: Now, I correct that mistake, and I rectify it—

The Court: Did you go by Greyhound bus?

The Witness: No, by bus from Lorain to Cleveland, but I was riding by car from here to Lorain, Ohio.

The Court: Did you ever testify before the Grand Jury that you had gone by Greyhound bus straight from New York through to Cleveland?

The Witness: Yes, your Honor, and I had a reason to do it and I did it and I am sorry for it.

The Court: Strike it out.

Q. Let me see if I can refresh your recollection of what you testified to before the Grand Jury.

The Court: What is the point of refreshing his recollection? He has already told us that he testified before the Grand Jury that he went from New York through to Cleveland by Greyhound bus." (Tr. 626a-627a.)

At the hearing on petitioner's motion for new trial, the occasion for Cantellops' change in his story concerning the Lorain-Cleveland trip was developed in the testimony of former narcotics agent Rowan. The latter testified that his investigation of certain bus schedules had revealed a fatal discrepancy in Cantellops' account of the trip (1249a-51a). Rowan had then informed Assistant United States Attorney Tendy of this discrepancy (1253a-54a), and as a result, in

June of 1958, Cantellops finally told Tendy in a private interview that he had made the trip to Lorain by car with Gigante (1254a-61a). Cantellops also told Tendy that Genovese was involved in the case (1257a, 1261a). Tendy thereafter informed Rowan and Assistant United States Attorney Walsh of this development in Cantellops' story (1261a). Rowan's testimony as to this matter was uncontradicted. It was corroborated by agent Enright insofar as it was within the latter's knowledge (see 1510a-11a), and the government did not call Tendy or Walsh. Rowan had destroyed his notes on the matter (1249a), so that they were unavailable for production at trial.

REASONS FOR GRANTING THE WRIT

As stated above, petitioner Gigante respectfully adopts the reasons for granting the writ of certiorari set forth in the petition of petitioner Genovese, since the issues concerning both petitioners are similar and the same questions have been presented.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

WILFRED L. DAVIS
166 East 61st Street
New York, New York

Counsel for Petitioner

June 7, 1963

APPENDIX A

Opinion

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 66—October Term, 1962

(Argued December 18, 1962 Decided March 8, 1963)

Docket No. 27377

UNITED STATES OF AMERICA, *Appellee*,

v.

ALFREDO AVILES, CHARLES BARCELLONA, CHARLES DI PALERMO, JOSEPH DI PALERMO, NATALE EVOLA, VITO GENOVESE, VINCENT GIGANTE, DANIEL LESSA, NICHOLAS LESSA, ROCCO MAZZI, CARMINE POLIZZANO, RALPH POLIZZANO and SALVATORE SANTORA, *Defendants-Appellants*.

Before:

WATERMAN, MOORE and MARSHALL, *Circuit Judges*.

Consolidated appeals from denials of appellants' motions for a new trial, United States District Court for the Southern District of New York, Bicks, *J.*, and Murphy, *J.*, pursuant to Rule 33, Fed. R. Crim. P. Affirmed.

VINCENT L. BRODERICK, United States Attorney, Southern District of New York (Arnold N. Enker, Arthur I. Rosett, Richard A. Givens, Asst. United States Attorneys, of counsel), *for appellee.*

ROY L. REARDON, New York City, *for appellant Barcellona.*

ALBERT J. KRIEGER, *for appellants Joseph Di Palermo, and Charles Di Palermo.*

MAURICE EDELBAUM, New York City, *for appellant Evola.*

EDWARD BENNETT WILLIAMS, Washington, D. C.; ROBERT L. WEINBERG, Washington, D. C.; WILFRED L. DAVIS, New York City, *for appellant Genovese.*

WILFRED L. DAVIS, New York City, *for appellant Gigante.*

HENRY K. CHAPMAN, New York City, *for appellants Nicholas Lessa and Rocco Mazzi.*

ALLEN S. STIM, New York City, *for appellant Ralph Polizzano.*

HERBERT S. SIEGAL, *for appellant Santora.*

WATERMAN, *Circuit Judge:*

After a three months' jury trial in the Southern District of New York, appellants were convicted, on April 17, 1959, of conspiracy to violate federal narcotic laws, 21 U. S. C. §§ 173, 174. Their convictions were affirmed on appeal to this court, 274 F. 2d 179, and the Supreme Court denied certiorari, 362 U. S. 974, 982, *rehearing denied*, 363 U. S. 858.

On August 26, 1960, appellants moved in the district court for a new trial, Rule 33, Fed. R. Crim. P., and put forth, as grounds for their motions: (1) alleged recantations of trial testimony by the principal government witness, Nelson Cantellops; (2) statements by Cantellops at the hearing on the motions for a new trial which were allegedly

inconsistent with his original testimony; (3) allegedly new extrinsic evidence tending to establish Cantellops' perjury in his trial testimony concerning a certain trip to Las Vegas, Nevada; (4) alleged concealment at the trial of a rent record in the possession of the Government; (5) alleged post trial statements by Cantellops which tended to discredit his trial testimony; (6) alleged spoliation of notes of federal Narcotics Agents Rowan, Consoli, and Muglia, in violation of the Jencks Act, 18 U. S. C. § 3500; and (7) failure of the Government to make available to the trial court certain interview notes of Assistant United States Attorney Donald H. Shaw, which notes were allegedly producible under the Jencks Act, 18 U. S. C. § 3500.

After extended hearings, Judge Bicks, who had presided at the original trial, denied appellants' motions insofar as they rested upon grounds 1 through 6 set forth above. 197 F. Supp. 536. He reserved decision with respect to the Shaw interview notes, indicating his intention to take further testimony regarding this issue. Due to the illness of Judge Bicks, however, the contemplated voir dire examination was not held. Judge Murphy was subsequently assigned to conduct the hearing and make a determination as to the ground upon which Judge Bicks had reserved decision. On December 22, 1961, Judge Murphy denied the motions for a new trial. 200 F. Supp. 711.

From these orders below adverse to them appellants now prosecute this consolidated appeal claiming that the grounds set forth above are individually and collectively sufficient to entitle them to a new trial under Rule 33, Fed. R. Crim. P. As to the grounds 1 through 6 set forth above, we affirm the order below on the careful opinion of Judge Bicks. As to the Shaw interview notes, we affirm the order of denial below for the reasons set forth hereafter.

During the course of the original trial, defense counsel inquired, following the direct examination of the Govern-

ment's principal witness, Nelson Cantellops, whether the United States Attorney had in his possession

> "any report or memorandum prepared by a government agent concerning any interview that was conducted with [Cantellops] at any time, under the Jencks decision and under 3500."

The Government subsequently made available to the court what were represented to be "the complete files of the Bureau of Narcotics" on Nelson Cantellops. No interview notes of Assistant United States Attorney Shaw were included in these materials, and, despite the fact that prior testimony indicated extensive questioning of Cantellops by Shaw, defense counsel made no further request for, nor objection to the nonproduction of, any Shaw notes still in existence.

Specific requests and objections relative to the Shaw notes were not made by counsel for appellants until the hearings below on the motions for a new trial. During the course of these hearings Shaw himself testified concerning notes he had taken of some 20 to 30 interviews with Cantellops, and of a "chronological statement of facts," prepared from these notes and other sources, concerning Cantellops' involvement in the alleged conspiracy.

Upon demand by counsel for appellants, the Government produced for Judge Murphy's *in camera* inspection two envelopes labeled, respectively, "Former Assistant U. S. Attorney Shaw's Chronology" and "Original Notes and Assorted Miscellany of Former Assistant U. S. Attorney Shaw."

In ruling on appellants' motions, Judge Murphy separated the Shaw materials into three groups:

(1) Materials which were not "substantially verbatim recitals" of Cantellops' statements. Into this group were placed Shaw's "chronology of facts," together with certain

of Shaw's "original notes and assorted miscellany." Ruling that these materials would not have been found producible under 18 U. S. C. § 3500 had then been made available for the court's inspection during the original trial, Judge Murphy concluded that their nonproduction was not prejudicial to appellants' interests. See *Rosenberg* v. *United States*, 360 U. S. 367, 370 (1959). We cannot say that Judge Murphy's findings with respect to these materials were clearly erroneous.

(2) Materials which were "probably Jencks' statements." Judge Murphy ruled that the nonproduction of this second group of materials, into which was placed "the great majority" of Shaw's original interview notes, was nonprejudicial to appellants on the ground that "virtually the[ir] entire contents" "correspond[ed] with the grand jury testimony of Cantellops which was turned over to the defense."

(3) Notes which "most assuredly should have been produced pursuant to § 3500." This group consisted of handwritten interview notes dated October 10 and 11, 1957. Although these notes contained new impeaching information not otherwise available to appellants, Judge Murphy ruled that nonproduction of these notes did not prejudice defendants' interests, in that defendants' cross-examination of Cantellops was not "unduly restricted" thereby:

> "• • • this witness was subjected to a most complete and searching cross-examination by able and experienced counsel during a period of 14 trial days, in the course of which his character and credibility were thoroughly explored and devastatingly attacked. The facts of his considerable prior criminal activities, his affliction with a loathsome disease, his immorality, his perjuries and his motive to misrepresent were all paraded before the jury without quarter. To be able with the use of the October notes to show that Cantellops spoke untruthfully on yet another occa-

sion * * * would simply add umber to an already blackened witness." 200 F. Supp. at 717.

Appellants now vigorously contend that in so ruling with respect to the second two groups of Shaw materials, Judge Murphy misapplied the test of harmless error laid down in *Rosenberg* v. *United States, supra,* and *United States* v. *Consolidated Laundries Corp.,* 291 F. 2d 563 (2 Cir. 1961).

The Government argues, for its part, as it did below, first, that appellants waived all right to object to the nonproduction of the Shaw materials by their failure to demand these materials, or to object to their nonproduction, at trial; second, that the materials constituted an attorney's work product, and as such were not producible under 18 U. S. C. § 3500; third, that the materials were neither statements of a witness, nor substantially verbatim recitals of such statements, and, for this reason, were not producible under the Jencks Act, 18 U. S. C. § 3500.

Because of our disposition of the Government's contentions, we do not reach the issue of harmless error from which appellants direct their major attack upon the order of Judge Murphy below.

We consider, first, the Government's suggestion that appellants are precluded from objecting to the nonproduction of the Shaw materials by failure properly to demand the materials, or to object to their nonproduction, at trial.

After the direct examination of Nelson Cantellops at the original trial, defense counsel asked, as indicated above, whether the United States Attorney had in his possession

> "any report or memorandum prepared by a government agent concerning any interview that was conducted with this witness at any time, under the Jencks decision and under 3500."

The court thereupon directed that "any such statement" be made available to counsel.

Counsel for the Government subsequently stated in open court:

> "The United States Attorney's office has examined all the reports in this case and we find that there is no report which would fall within the ambit of Section 3500 and therefore need not be turned over to defense counsel."

When the court asked whether there was "any report whatever" that dealt with Nelson Cantellops, government counsel responded affirmatively, and Judge Bicks declared that he would examine those reports to determine whether they fell within Section 3500.

The Government now argues that defense counsel's request for "any report or memorandum prepared by a government agent" encompassed only reports of "Agents" of the Bureau of Narcotics, and not those of Assistant United States Attorneys, who, it is sought to have us believe, are not "government agents." Even if Shaw's materials were producible under the Jencks Act, the Government contends that, by their failure to make a timely demand, appellants are precluded from raising the issue upon this motion for a new trial.

Ours is an adversary system of criminal justice. It is not, however, a "game of verbal jackstraws," the object of which is to see whether the actions of either the Government or the defense can be pulled out from under the language of applicable statutes, the demands of opposing counsel, or the orders of the court, without disturbing any of the latter. Cf. Llewellyn, Jurisprudence 445 (1962). By enacting the Jencks Statute, 18 U. S. C. § 3500, Congress provided criminal defendants with a sharply circumscribed, but nonetheless important, right to obtain information from

the prosecution in criminal proceedings. To utilize that right, defense counsel must proceed with unusual diligence. Counsel is entitled to no statements of a government witness until the witness has testified on direct examination, yet the statement is unlikely to be of value unless it is secured and studied by counsel prior to cross-examination. Counsel must often frame requests under the Act with little or no information concerning the circumstances under which, or the agents to whom, the witness may have given producible statements. Moreover, defense counsel ordinarily has no basis upon which to object to government nonproduction of requested statements where unspecified materials are retained by the court following *in camera* inspection.

To these impediments to an effective invocation of Jencks Act rights by defendants in criminal cases the Government would now add the niceties of ancient common law pleading in the formulation of demands for producible statements. Of course the Act does not require that demands for statements must be of precise nicety, and we are unwilling to hold that such requests be couched in formal or technical language.

The Government further argues that the Shaw materials were the work product of an attorney and as such were not producible under 18 U. S. C. § 3500. In so arguing, the Government relies principally upon *Hickman* v. *Taylor*, 329 U. S. 495 (1947) and the public policy reflected therein. *Hickman* v. *Taylor*, however, was concerned solely with discovery in civil proceedings. The obtaining of statements of witnesses in the hands of the prosecution which the defense may use for impeachment purposes in criminal trials is made possible by the Jencks Act. That act makes no distinction among statements on the basis of the purpose for which they were recorded or the type of government agent to whom they were made. *Saunders* v. *United States*, — F. 2d — (D. C. Cir. 1963) (No. 17,122).

We are brought, finally, to the Government's contention, vigorously argued below and renewed on this appeal, that the Shaw interview notes were not "substantially verbatim recitals" of statements by Nelson Cantellops, and thus were not producible under the Jencks Act. If the Government's contention be upheld on this point, it follows that appellants' motions for a new trial were properly denied, insofar as they rested upon nonproduction of the Shaw materials. Appellants cannot have been prejudiced by the nonproduction of materials which, even had they been disclosed to the trial court for *in camera* inspection, would not have been found producible for defendants' use under the Act.

In ruling that the October 10 and 11 notes were Jencks "statements," and that the great majority of Shaw's other original interview notes were probably "verbatim recitals" within the Act's definition, Judge Murphy relied solely upon the notes themselves and upon the record of Shaw's earlier testimony before Judge Bicks. Judge Murphy conducted no voir dire examination of Shaw and received no testimony from any other witness prior to ruling upon this portion of appellants' motions.[1] As we have available to us all of the materials upon which Judge Murphy based his rulings, our conclusion with respect to this factual issue is entitled to no less weight than that of the Court below.

In determining whether the Shaw notes were "statements" within the Jencks Act definition of that term, 18 U. S. C. § 3500(e), the cases provide certain well-defined criteria to assist us. Such a statement must, of course, be "a substantially verbatim recital of an oral statement made

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[1] Judge Murphy was not, of course, required to conduct a voir dire examination of Shaw, or to hold any hearing whatever, before determining whether these disputed documents were within the Jencks Act. As the Supreme Court said in *Palermo* v. *United States*, 360 U.S. 343, 344-45 (1959), it is "the function of the trial judge to decide in the light of the circumstances of each case, what, if any, evidence extrinsic to the statement itself may or must be offered to prove the nature of the statement."

by [the] witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." 18 U. S. C. § 3500(e)(2). The statement must fairly be "the witness' own words." *Palermo* v. *United States*, 360 U. S. 343, 352 (1959). It must "reflect fully and without distortion what had been said to the government agent." Ibid. The distortion which Congress sought to avoid by its narrowly-drawn definition "can be the product of selectivity as well as the conscious or inadvertent infusion of the recorder's opinions or impressions." Thus, "a report which merely selects portions, albeit accurately, from a lengthy oral recital" will not be producible under the Act. Ibid.

In applying these criteria to the Shaw interview notes, we may consider, as did Judge Murphy, the general tenor of the notes themselves, Shaw's extensive testimony before Judge Bicks concerning the interviews and notes, and Shaw's affidavit, submitted to Judge Murphy in support of the Government's motion for reargument below and properly part of the record on this appeal.

Shaw testified at the post-trial hearing before Judge Bicks that he met with Cantellops 20 or 30 times over the course of almost a year. He testified that Cantellops spoke rapidly and in poor English, requiring that he "almost translate it and put it into a more recognizable form of English".[2] He stated that the notes were never read back to Cantellops, that Cantellops never signed or initialed them, and that only about one half of the notes contained information elicited from Cantellops, the remainder containing information coming from "close to a dozen differ-

[2] This testimony is supported by the testimony of Narcotics Agent Rowan before Judge Bicks that it was "impossible" for him to keep up with Cantellops' statements in his note-taking, and that Cantellops spoke rapidly, in bad English, ungrammatically and indistinctly. Judge Bicks, himself relying on his familiarity with Cantellops' testimony during the trial, indicates agreement with this characterization of Cantellops' speech habits. 197 F. Supp. at 557.

ent sources." Finally, Shaw testified that it was his practice to go over the notes after the interview and make additions to them, as the notes were taken not for the purpose of providing a record of Cantellops' testimony, but to assist Shaw in drafting the chronological statement and to serve as a guide in interrogating Cantellops before the grand jury.

Shaw's affidavit, submitted to Judge Murphy in support of the Government's motion for reargument, substantiates the foregoing, and adds that Shaw was selective in his note-taking and did not record the testimony that he thought was "incoherent, illogical or in conflict with what the assistant then knew to be the fact from other witnesses."

Finally, the documents themselves indicate that they are the result of a process of selection. They are not as voluminous as they would be if they were complete transcriptions of Shaw's 20 to 30 interviews with Cantellops. Further, the signs of addition and interpolation are evident on the face of the documents.

We hold, consequently, that the Shaw materials contained no statements which, had they been delivered to the trial court for *in camera* inspection, would have been found to be producible under the Jencks Act.[3] The orders of Judge Bicks and Judge Murphy, denying appellants' motions for a new trial, are, accordingly, affirmed.

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[3] Our conclusion in this respect should not be read as a condonation of the Government's failure to deliver the Shaw materials to the trial court for *in camera* inspection. We fully concur in Judge Murphy's disapproval of the Government's reprehensible actions in this respect. 200 F. Supp. at 714. In *Palermo v. United States*, 360 U.S. 343, 354 (1959), the Supreme Court laid down the rule that even before that time was the practice in this circuit: "When it is doubtful whether the production of a particular statement is compelled by the statute, we approve the practice of having the Government submit the statement to the trial judge for an *in camera* determination. Indeed, any other procedure would be destructive of the statutory purpose."

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of March one thousand nine hundred and sixty-three.

Present: HON. STERRY R. WATERMAN, HON. LEONARD P. MOORE, HON. THURGOOD MARSHALL, *Circuit Judges.*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

ALFREDO AVILES, ET AL., *Defendants,*

CHARLES BARCELONA, ET AL., *Defendants-Appellants.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

A true copy,
A. DANIEL FUSARO
Clerk

Letter Modifying Opinion

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Chambers of
Sterry R. Waterman
U.S. Circuit Judge
P.O. Box 178
St. Johnsbury, Vermont

March 19, 1963

A. Daniel Fusaro, Clerk
U. S. Court of Appeals, 2 Cir.
U. S. Court House
Foley Square
New York 7, N. Y.

Dear Mr. Fusaro; In re: Docket No. 27377
U.S. v. *Aviles, et al*

Will you please make the following change in the above opinion:

> On slip sheet 1354, footnote 3, please strike the second sentence and insert in lieu thereof: "See Judge Murphy's discussion, 200 F. Supp. at 714."

Thank you very much.

Sincerely,

/s/ Sterry R. Waterman
Sterry R. Waterman

A true copy,
A. Daniel Fusaro
Clerk

Letter Modifying Opinion

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Chambers of
Sterry R. Waterman
U.S. Circuit Judge
U.S. Court House
New York 7, N.Y.

March 28, 1963

Memo to ADF

In re: Docket No. 27377
United States v. Aviles et al.

Dear Mr. Fusaro:

Will you please notify everyone who is entitled to be notified that the opinion in this case is modified by the deletion of the word "clearly" where it appears in the last line of subparagraph (1) on page 1347 of the slip sheets. Sentence will now read:

> "We cannot say that Judge Murphy's findings with respect to these materials were erroneous."

Sincerely,

/s/ STERRY R. WATERMAN
Sterry R. Waterman

Copy to West Pub. Co.

A true copy,
A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, *Appellee*,

v.

ALFREDO AVILES, ET AL., *Appellants*.

Denial of Petition for Rehearing

Wilfred L. Davis, New York, N.Y., for appellant Vincent Gigante.

Petition denied.

S. R. W.
L. P. M.
T. M.
U.S.C. JJ.

10 APR 1963

Denial of Petition for Rehearing In Banc

Wilfred L. Davis, New York, N.Y., for appellant Vincent Gigante.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

J. EDWARD LUMBARD
Chief Judge

10 APR 1963

APPENDIX B

Text of the Jencks Act, 18 U.S.C. § 3500:

§3500. Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event

the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 194

NATALE EVOLA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 195

SALVATORE SANTORA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 196

VITO GENOVESE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 197

VINCENT GIGANTE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 79 MISC.

JOSEPH DI PALERMO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 80 MISC.

CHARLES DI PALERMO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 115 MISC.

ROCCO MARSIC, PETITIONER

v.

UNITED STATES OF AMERICA

No. 149 MISC.

CARMINE POLIZZANO AND RALPH POLIZZANO, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 224 MISC.

CHARLES BARCELLONA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (C.A.R. 42–53) is reported at 315 F. 2d 186.[1] The opinions of the district court (T. Tr. 9627–9693, 9834–9847; H. App. 1707–1755, 1784–1797) are reported at 197 F. Supp. 536 and 200 F. Supp. 711. A prior opinion of the court of appeals is reported at 274 F. 2d 179, certiorari denied, 362 U.S. 974, 982.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1963 (C.A.R. 42, 54). Petitions for rehearing filed by eight of the petitioners were denied

[1] The record consists of twenty-three volumes, as follows: (1) The complete trial transcript and most of the post-trial district court file, consisting of eleven consecutively paginated volumes, is referred to as "T. Tr."; (2) a separately paginated one volume appendix of the trial, filed by the petitioners, is referred to as "T. App."; (3) the complete four volume consecutively paginated transcript of the hearings on the motions for new trial is referred to as "H. Tr."; (4) the four volume consecutively paginated appendix of the hearings on the motions for new trial, which contains in addition certain selected exhibits introduced into evidence at the hearings, is referred to as "H. App."; (5) a one volume separately paginated appendix of the hearings on the motion and related data, filed by the government in the court of appeals, is referred to as "G. App."; (6) a one volume separately paginated transcript of the grand jury testimony of the witness Cantellops is referred to as "G.J."; (7) a one volume separately paginated record of proceedings in the court of appeals, filed by the petitioners, is referred to as "C.A.R."

We are lodging with the Clerk of this Court, in addition to selected materials above, the exhibits (exclusive of a few items such as the $500 bribe money, tape recordings, etc.) introduced into evidence at the hearings, to which reference will be made as "G. Ex." or "D. Ex." Other materials lodged by the petitioners are referred to descriptively.

on April 10, 1963 (C.A.R. 116–156). As to some petitioners, Mr. Justice Harlan extended the time for the filing of petitions for writs of certiorari to various dates up to and including June 10, 1963. All petitions of writs of certiorari were filed within thirty days from the entry of judgment or from the denial of the petitions for rehearing in the court below, or within the time as extended by this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether, after full hearings, the district court properly denied motions for new trial filed subsequent to affirmance of the convictions and based on:

(a) Disavowed recantations of trial testimony by the chief government witness;

(b) The government's failure to produce certain notes of interviews with the chief prosecution witness; and,

(c) The destruction of certain notes of interviews with the same witness, which had been incorporated in reports made available at trial.

STATEMENT

After a three-month trial in the United States District Court for the Southern District of New York before the late Honorable Alexander Bicks and a jury, petitioners and two others were convicted in April 1959 of having conspired to violate the Narcotic Drugs Import and Export Act. Their convictions were affirmed on appeal, and this Court denied petitions for writs of certiorari. 274 F. 2d 179, certiorari

denied, 362 U.S. 974, 982. The evidence at the trial is summarized in detail in the government's brief in opposition in that case. Nos. 735, 763, 772, 807, 812, 817, 750 Misc., 792 Misc., 793 Misc., and 840 Misc., O.T., 1959. In general it showed that Cantellops, the principal government witness, made a number of trips to cities in the United States (Las Vegas, Chicago, Cleveland, Miami and Philadelphia) for the purpose of picking up or delivering narcotics either with or at the behest of various petitioners; that a number of narcotic transactions involving some of the petitioners and others were consummated; and that various petitioners attended meetings at which the importation, distribution and territorial control of narcotics were discussed and planned.

On August 26, 1960, two months after Genovese's petition for rehearing was denied by the Court (363 U.S. 858), petitioners moved for a new trial on grounds of newly discovered evidence, alleging that Cantellops had recanted his trial testimony and that newly discovered extrinsic evidence showed that he had given false testimony at the trial. A protracted hearing on the motions was held before Judge Bicks, beginning in early 1961. During the proceedings, the court allowed the petitioners to amend their motions to include allegations that government agents had deliberately suppressed evidence in the case by the destruction of records which otherwise would have been available at the trial.

On May 1, 1961, Judge Bicks denied the motion on all grounds except as to the issue whether an Assistant United States Attorney's notes and memoranda,

which were not produced at the trial, were within the scope of 18 U.S.C. 3500 (T. Tr. 9627–9693; H. App. 1707–1755). 197 F. Supp. 536. In August 1961, due to illness of Judge Bicks, the Honorable Thomas F. Murphy was assigned that part of the proceedings upon which Judge Bicks reserved decision. (H. App. 1758). On December 22, 1961, Judge Murphy denied the remainder of the motions (T. Tr. 9834–9847; H. App. 1784–1796). 200 F. Supp. 711. The court of appeals unanimously affirmed. 315 F. 2d 186.

1. *The recantations of Cantellops.*

Although only three of the petitioners (Santora and the two Polizzanos (No. 1167, and No. 1515 Misc.)) raise any issue in this Court as to the denial of the motion for a new trial on the basis of the recantations of Cantellops, and although the evidence of that motion is fully discussed in the opinion of Judge Bicks (197 F. Supp. 536), we are setting forth a summary of the evidence in respect thereto to direct the Court to the pertinent parts of the record, and as background for the other issues raised.

a. Cantellops was subpoenaed as a defense witness at the hearing on the motions for new trial. He testified under sequestration and without having discussed his testimony with agents of the government (H. App. 191–192, 214–215, 219, 314–321, 855–856, 966–967, 986; see G. App. 20–21). He reaffirmed the truth of his trial testimony (H. App. 213; see H. App. 193, 246, 268–269, 2015, 2034).

b. Cantellops had testified before the grand jury prior to the trial that he knew that people who talked "just disappear[ed]" (G.J. 116–120, 138–139).

While the original case was pending on appeal, Cantellops' sister-in-law was killed by an automobile driven by a "Joe" (Joseph Marino) who had been making inquiries in the neighborhood as to the whereabouts of Cantellops (H. App. 302–304).[2]

During January 1960, while the case was pending on petitions for certiorari, Cantellops received a number of threatening telephone calls by unidentified parties (H. App. 138, 144). John Ormento and Carmine Galente, defendants in the indictments who had been fugitives at the time of the trial, were at large during this period. Ormento himself telephoned Cantellops at a restaurant on a number of occasions. He said that as long as Cantellops "play[ed] the game" with him Cantellops did not have to worry, but otherwise "they knew where all [his] family were" (H. App. 131–144). Orlando Ramos, a dishwasher at the restaurant, testified that Cantellops appeared "nervous" and paced back and forth after a certain telephone call, and that Cantellops told him that "he was in a dangerous business" (H. App. 1316–1317).

c. About January 22, 1960, Ormento spoke with Cantellops for about 15 or 20 minutes in Cantellops' restaurant (H. App. 144–145, 1319). Ormento gave Cantellops a typed draft of a statement (G. Ex. 2) which he wanted Cantellops to sign (H. App. 394–395). It recited that Cantellops had never met Ormento or Galente, that Cantellops had lied at the

[2] At the hearings on the motion, Marino claimed the privilege against self-incrimination as to questions about the accident, as to whether he was related to the accomplice, Salvatore Marino, and as to other matters (H. Tr. 2364–2368).

trial because of promises made to him by the United States Attorney and by narcotic agents, and that these people rehearsed his trial testimony with him "about one hundred times" (G. Ex. 2). The spaces for the names of the United States Attorney and narcotic agents were blank, and Ormento told Cantellops to fill in the blanks with any names he wanted (H. App. 394–395). Ormento gave $20 to Ramos (who did not hear the conversation) and $50 to Cantellops (H. App. 1319–1320, 2031). After Ormento left, Cantellops told Ramos to telephone the Narcotics Bureau in the event that something "happened" to him and that Ramos should try to be with Cantellops all the time (H. App. 1349, 1350; see H. App. 141–142; G. App. 63). Shortly thereafter, Cantellops wrote out his first recantation statement and gave it to Ormento (H. App. 145). On the following day, Ormento returned the statement saying that it was "no good" (H. App. 145).

Later, Ormento agreed to give Cantellops $3,000 as an installment on $30,000 to be paid for another recantation statement (H. App. 139–140, 146–147). Ormento offered Cantellops $100,000 if he would recant as to the other defendants, the deal being that Cantellops would receive $3,000 as the first installment, $27,000 as the second installment, and the balance as the "deal" progressed (H. App. 163–164, 166–168, 379–380).

d. About January 26, 1960, Cantellops, in accordance with arrangements made by Ormento (H. App. 467–469; see H. App. 1534–1541), went to the rectory of the Mount Carmel Catholic Church in the Bronx.

692-938—63——2

He was accompanied by Ramos, who waited outside (H. App. 1320). Siegal telephoned Cantellops at the rectory, explaining that the lawyers had been there but left because they feared that he had brought F.B.I. agents with him (H. App. 222–224). Siegal instructed Cantellops to meet him later at his office (H. App. 222–224).[3] That evening, at Siegal's office (H. App. 231–234, 397–399), Ormento "dictated" or "suggested" a statement (H. App. 224, 229–234) in which Cantellops retracted his testimony about Ormento and Galente (H. App. 476–477; G. App. 28). Ormento then gave Cantellops $200 (H. App. 382, 383, 1322; see H. App. 844, 852). On the following day, a messenger returned the statement to Cantellops with the message that it was not "strong enough" because it did not contain the names of the government agents (who allegedly suborned the perjury) (H. App. 228–230).

On January 27, 1960, in the rectory of the same church, Cantellops met with a priest and attorneys Siegal (representing Santora), Wilfred Davis (representing Genovese) and Amedeo Lauritano (representing Pappadio). Unbeknownst to Cantellops or the priest, Lauritano brought with him a recording device, concealed in a case, which he turned on during the conference (H. App. 402–403, 478, 498–500). A notary was called, and the statement which Can-

[3] Siegal testified that he watched the church from across the street, that he saw a Spanish-looking man whom he did not recognize enter the church, and that when he did not see Cantellops enter he left without checking whether Cantellops was there (H. App. 469–472, 1320).

tellops had previously written in the rectory was signed and notarized (H. App. 131–132, 404, 496, 499). At that point, Attorney Davis asked Cantellops some questions (T. Tr. 2959–2962; H. App. 401, 499; G. App. 26). "Under those circumstances", Cantellops later testified he "had to say" that his conscience bothered him, that he did not know Ormento or Galente, and that Narcotic Agent William Rowan suggested testimony to him about Ormento (H. App. 134–135; see H. App. 500).[4] The meeting then broke up, and Cantellops walked out of the rectory with the notarized statement. He delivered the statement to Omento in Siegal's office out of Siegal's presence after he received $3,000 in $100 bills from Ormento (H. App. 188–189, 371, 383; see H. App. 846, 849–850).

e. On February 3, 1960, Cantellops testified before a grand jury which was investigating his recantations set forth above. He told the grand jury that his recantation was not true, and that he had testified truthfully at the trial (H. App. 2015, 2034). At about this time, he told the government agents about the $3,000; gave them a statement as to how he spent approximately $2,500 and turned over to them $500 in $100 bills (H. App. 364, 371, 381–387, 391–392, 850–851, 853, 962, 977–978, 1937; G. App. 53–57). Cantellops also wrote out two statements for the government in which he recited the contacts by Ormento and reaffirmed his trial testimony (H. App. 2000–2003, 2004–2011; Court's Exs. 1 and 2).

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[4] The tapes were admitted but much of the conversation was "incomprehensible" (H. App. 505).

f. In early July 1960, Cantellops received a message to telephone Siegal, which he did (H. App. 181, 183, 236). Cantellops, who testified he was "under threat from outside" at that time, said he "went along with the game to see all about this" (H. App. 194). Ormento told Cantellops that "Siegal and I are arranging. Everything he does is all right" (H. 194).

On July 20, 1960, Cantellops met Siegal at the entrance of the building where Siegal had his office (H. App. 183–184, 234; see H. App. 407, 412).[5] There, the two men began to discuss one Joseph Linares, and Siegal said that it would be a "great help" if Cantellops went along with Linares' testimony (H. App. 184). Siegal then gave Cantellops a "lay-down of what he wanted done" (H. App. 197). The idea was that Cantellops was to change his testimony concerning the Las Vegas trip, i.e., the first of Cantellops' many trips for the conspirators (H. App. 184).

After a few minutes of discussion, the two men went up to Siegal's office. Siegal had a special recording device (with a microphone inside a telephone receiver) which was turned on during the conversations with Cantellops at that time and on July 22 (H. App. 413–414, 424, 428, 430–431).

The "main thing" Cantellops said was that "they wanted a change in testimony" (H. App. 185). Siegal made the "suggestion" that there "should be the denial of knowing these people in certain places

[5] Cantellops met Siegal at his office earlier in July (H. App. 181; see H. App. 407). Cantellops telephoned Siegal's office about seven times during July (H. App. 235).

and meetings" (H. App. 195). Siegal wanted Cantellops to say that the "Mexican" was a "con-man" who had nothing to do with narcotics (H. App. 196). At the suggestion of Siegal, Cantellops said that he had not been at Mazzie's house and that a meeting with Genovese never took place (H. App. 202–203, 205, 213–214). Cantellops told Siegal that he had not seen Santora until the time he entered the court room because Siegal "wanted that, so I told him that not as a fact but as a way that he wanted it to be said" (H. App. 194). According to Siegal's "wishes," Cantellops said that he was "lectured" by narcotic agents on what to say between his first and second grand jury appearances (H. App. 199). Cantellops told Siegal a "lot of things" which were "on rehearsal at that time" (H. App. 193). Siegal "changed and improved" Cantellops' answers (H. App. 204–205).*

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*Much difficulty was encountered in playing back the Siegal tapes, and a technician eventually got the tape of July 20 to play by manually holding the tape back to slow it down (H. App. 420–421, 424, 426–428). Siegal testified that he had made no changes or erasures on the tapes and did not re-record any part (H. App. 417–419). Reiter, the man who sold Siegal the recording device in question, which was a 60 cycle machine, testified that while he was in Siegal's office he observed that Siegal also had a 50 or 60 cycle German recording machine (H. App. 1433, 1435, 1438, 1440–1442). Reiter testified that when he played the tape of July 20 outside of the court room, he held the tape back in order to get it to play, that quite suddenly it went all off altogether, and then, when released, was on speed (H. App. 1437).

In Reiter's opinion, the first two-thirds of the tape was not an original recording on the machine sold to Siegal, or if it was an original recording, it had been subsequently

g. On July 27, 1960, Cantellops was arrested for a parole violation and was imprisoned in the "Tombs" in New York City.[1] The next day he was threatened and "brutally beaten" by unidentified parties (H. App. 220–221, 286, 302, 313).

In September, 1960, Cantellops wrote a letter to Siegal in an effort to protect his life while in jail and to prevent "drastic action by these people against certain members of my family" (H. App. 305–307; D. Ex. "F").

During a period beginning in August 1960, the same "Joe" who had killed Cantellops' sister-in-law was "pushing" Cantellops' son, Nelson Silva (H. App. 220, 323–324). Nelson Silva visited Cantellops on most of the visiting days while "Joe," who accompanied Nelson Silva to the jail, remained outside, often visible to Cantellops inside (H. App. 330–331). During this period, "Joe" told Ramos that he wanted him to get Cantellops "to help some friends," and said that he would give Ramos some money (H. App. 1342; see D. Ex. G–2). "Joe" had asked Cantellops' wife to tell Cantellops in a letter to please help one of "Joe's" friends, which she did (G. App. 84; D. Ex. G–1). In the meantime, "Joe" was supplying Cantellops' wife with money on a regular basis (H. App. 323–324, 340–341, 1340–1341; G. App. 82–83, 85;

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transcribed on another machine (H. App. 1436–1441, 1445; G. App. 73–79).

[1] From that time to about the commencement of the hearings on the motions for new trial, Cantellops spoke with the government agents only on two or three occasions. He did not mention his meetings with Siegal because he did not consider them serious (H. App. 192–194).

D. Exs. G–1, G–3, G–4).[*] Cantellops then gave a letter (apparently to Ramos; see D. Ex. G–1) in blank with the names of the individuals to be affected thereby to be filled in later (H. App. 220).

h. The District Court ruled that the "circumstances surrounding each alleged recantation incline the Court to the view that they were the result of coercion, bribery and misdealing and, therefore, entirely unworthy of belief." 197 F. Supp. at 540.

2. *Alleged newly discovered extrinsic evidence.*

a. At the original trial, Cantellops testified that in 1955 Barcellona told him that he could repay a loan of $500 by taking a trip for the purpose of delivering "junk," *i.e.*, narcotics (T. Tr. 983–987). Cantellops agreed to the proposition. He met with Barcellona, Joseph Di Palermo, the Polizzano brothers and Anthony Colonna and discussed the manner in which the "package" should be carried (T. Tr. 993–998). Later Barcellona instructed Cantellops to go to the "Golden Nugget" Casino in Las Vegas and try to make contact with Carmine Polizzano there. He said that if Polizzano did not show up right away, that Cantellops was to rent a cheap room and wait

[*] In one letter (D. Ex. G–1), the wife said that a "man" was going to bring a new refrigerator, and she asked for advice on what to do (H. App. 340). Nelson Silva had told Cantellops that "Joe" had used the word "refrigerator" to mean money (H. App. 340–341). Other letters from Cantellops' wife indicated that she was receiving money from a "man" (D. Exs. G–3, G–4; see G. App. 84). A letter from Ramos indicated that he had been contacted by "Joe" who wanted a "letter" from Cantellops (D. Ex. G–2; see H. App. 338–339). These letters were subsequently turned over to agents of the government (H. App. 341–342).

there until Polizzano met him (T. Tr. 1000). An unidentified man handed Cantellops a four to six pound gift wrapped package (T. Tr. 1002–1003). Cantellops then left for Las Vegas by way of a flight to Los Angeles.

In Las Vegas, Cantellops went to the Golden Nugget Casino but was unable at first to locate Carmine Polizzano (T. Tr. 1013–1015, 2407, 2804–2805, 3206–3207). He rented a "cheap room" and "hung around" the Casino, eventually obtaining employment as a card dealer (T. Tr. 1014–1016, 1017, 2402–2403, 2406–2409, 2750, 2752–2758, 2768, 2769, 2771, 2774, 2778, 2786, 2788, 3206, 3461–3462). During this period, he met Carmine Polizzano who introduced Louis Fiano to him as "the man that will get the gift with the stuff" (T. Tr. 1020, 1021–1022, 1025–1027, 2409–2417, 2805, 2824, 3207). Later that evening, Cantellops handed Fiano the gift wrapped package of narcotics and wished him a "Happy Birthday" (T. Tr. 1027–1028). Polizzano gave Cantellops some money and left (T. Tr. 1030). Shortly thereafter, Cantellops left Las Vegas and returned by automobile to New York "with one of those fellows from New York who lost his money and needs gas and expenses to come back" (T. Tr. 1030; see T. Tr. 2419–2427, 2436–2440, 2444–2454). Cantellops had remained "closer to two weeks" in Las Vegas (T. Tr. 2750–2752; see T. Tr. 2735–2736), and had enough money for the return trip to New York.

b. At the hearing on the motions for new trial, Cantellops testified that in January or February 1955 he had been arrested in New York City with Joseph

Linares in a conspiracy case involving the substitution of a zircon stone for a diamond, and that he and Linares were thereafter released on $500 bonds (H. App. 289–290, 291, 348–349, 359; see H. App. 1964–1972). The Las Vegas trip, however, had nothing to do with Cantellops' involvement in the "diamond conspiracy" case (H. App. 348–349). After Cantellops had completed the purpose of the Las Vegas trip and while he was still in the city, Linares and one Dominick Stella, a narcotics "pusher" and a gunman for the syndicate, respectively, met him there in order to bring him back to New York City for the syndicate (H. App. 287, 292, 348–349).* Cantellops then returned to New York by automobile with the two men, sharing expenses on the way back (H. App. 287, 292, 349). Cantellops testified that he suppressed what he knew about Linares and Stella at the trial because he "was afraid" since they knew Cantellops' family (H. App. 287, 293, 294–295, 296–297, 357). He said that Linares and Stella were "dangerous," and that he kept out of the case those people who could hurt his family (H. App. 294–295).

c. Linares testified that when Cantellops did not appear in court, he began to look for him, eventually discovering that he had gone to Las Vegas (H. App.

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*The Government's evidence showed that on May 6, 1955, one Orlando Seda was arrested in Linares' apartment where about eight ounces of heroin were found and seized (H. App. 1462–1464, 1479, 1661–1663, 1667, 1673–1674, 1679–1680, 1684; see H. App. 598, 609, 762). While the detectives were in the apartment, Stella knocked on the apartment door and entered (H. App. 1674–1675). Shortly thereafter, Stella was arrested and later convicted for the possession of six or seven ounces of heroin in his apartment (H. App. 1471).

577–580, 607–608, 612–615; see H. App. 1966). Linares said that he was "responsible" for Cantellops since his friends had posted the bond, and that Cantellops was the only person who could "clear" him of the charge (H. App. 601, 619; see H. App. 778, 779, 1693–1695, 1697, 1699).

Linares and his friend Stella drove in Seda's automobile to Las Vegas where they met Cantellops (H. App. 580–581, 599, 626–627, 629, 778, 779, 786–787, 1691–1692). According to Linares and Stella,[10] Cantellops said that he had come to Las Vegas in order to gamble, that he had lost his money there, and that he had not eaten in two or three days (H. App. 582–585, 631, 634, 782). Linares paid Cantellops' room rent and the three men spent the night in Cantellops' room with Linares and Stella taking turns watching Cantellops (H. App. 583–584, 616–618; cf. H. App. 781). On the following morning, the three men left Las Vegas in Seda's automobile and returned to New York (H. App. 583–585, 785). According to Stella, the Las Vegas trip had nothing to do with narcotics (H. App. 634–635, 637). Linares did not deal in narcotics and

[10] Before the diamond conspiracy case could be disposed of, Linares left for Puerto Rico where he was arrested and subsequently pleaded guilty to charges of robbery and violations of the Arms Law (two charges) of Puerto Rico (H. App. 590, 593, 598; G. Exs. 6 and 6A). He had also jumped bail from Puerto Rico on these charges.

At the time of the hearing, Stella was serving a sentence in the Clinton Prison in New York on a state conviction (H. App. 626, 1593). He had three felony convictions, including one for robbery and one for narcotics, and had been committed to the Dannemora State Hospital for the criminally insane from July 1957 to August 1959 (H. App. 634–635, 637, 638, 774–776, 1593; see H. App. 804–805, 807–809).

never knew Cantellops to be connected with narcotics (H. App. 586, 612; see H. App. 794–795). Stella said that he did not enter the narcotics traffic until after he returned to New York from Las Vegas (H. App. 634–635, 637). In New York, there was no need for Linares or Stella to watch Cantellops (as they had done in Las Vegas) because they were convinced that they had no reason to worry that he would return to Las Vegas (H. App. 785–786).[11]

d. The district court ruled that the only demonstrably false trial testimony of Cantellops with respect to the Las Vegas trip touched upon the identity of the individual with whom he returned; that such evidence did not bear on the material issues in the case; and that had Cantellops identified Linares and Stella at the trial that testimony would rather have tended to tie Cantellops closer to the conspiracy. 197 F. Supp. at 548–549.

3. *The production of documents.*

a. The proceedings at trial.

At the trial, toward the close of the government's direct examination of Cantellops, the court ordered the United States Attorney to make Cantellops' grand

[11] At the hearing, Stella testified that he signed the affidavit (G. Ex. 13) attached to Genovese's motion papers while in prison, following an interview with Albert Kreiger, attorney for the Di Palermo brothers (H. App. 632, 789; see H. App. 809–810, 818–819, 1593–1594). Kreiger, who visited Stella on seven occasions from October 1959 to June 1960 (G.E. 38), testified that Stella read the affidavit over before signing it (H. App. 819–820; see H. App. 1597). Stella, however, had difficulty reading the affidavit at the hearing and the court observed that Stella "[o]bviously * * * never read this affidavit" (H. App. 799–800).

jury testimony available to defense counsel (T. Tr. 1392).

Defense counsel also requested that the government turn over to them all copies of statements and reports of government agents dealing with the witness Cantellops (T. Tr. 1395, 1591–1592, 1610). The United States Attorney turned over the grand jury testimony and statements from Cantellops dated October 10, 1957, and January 16, 1958 (T. Tr. 1392, 1400–1401, 1479, 1592, 3266–3268).[12] In addition, the United States Attorney submitted to the court the complete files of the New York Branch of the Bureau of Narcotics on the case (T. Tr. 1592–1593, 1615, 2018). The court spent about thirty hours examing these files (T. Tr. 2052), and, on February 4, 1959, conducted *voir dire* examinations of Narcotic Agents John Enright (T. Tr. 2013–2018, 2039–2042), Norman Matuozzi (T. Tr. 2019–2024), Anthony Consoli (T. Tr. 2030–2039) and Armando Muglia (T. Tr. 2042–2045) in order "to aid the Court in determining whether any of [the reports came] within subdivisions 1 and 2 of (e) of Section 3500" (T. Tr. 2013). The court turned over reports which the agents said were

[12] The statement of January 16, 1958, was not turned over to defense counsel until February 19, 1959, when it was located by the United States Attorney (T. Tr. 3267). The United States Attorney informed the court at that time that "in the preparation of this case from its inception * * * many different Assistant United States Attorneys have been involved, and during the course of the trial when counsel have asked whether certain documents were in existence I continually conferred with them, and this one turned up. When it turned up we turned it over" (T. Tr. 3268).

substantially verbatim accounts of statements from Cantellops (T. Tr. 2013–2018, 2019–2025, 2033–2037, 2042–2044).

On February 18, 1959, at the suggestion of the government, the court conducted a *voir dire* examination of Narcotic Agent William Rowan concerning four of his reports (T. Tr. 3159–3173). Rowan testified that his "notes" of interviews with Cantellops, on which his reports were based, were not in existence, and the court refused to inquire, as suggested by counsel for Evola and Gigante, whether the notes had been "destroyed" (T. Tr. 3170). The court ordered portions of four of Rowan's reports which, according to Rowan's testimony, were substantially verbatim accounts of what Cantellops had told him turned over to defense counsel (T. Tr. 3172–3173; see H. App. 2058–2061).

On cross-examination, Cantellops testified that he had been interviewed on numerous occasions between the summer of 1957 and into 1958 by Assistant United States Attorney Donald Shaw; that Shaw had examined him before the grand jury; and that thereafter he had been interviewed by Assistant United States Attorneys Walsh and Tendy, and by United States Attorney Arthur Christy (T. Tr. 1564–1566, 1579–1585, 1587–1591, 1631, 1651–1652, 1887–1890, 1896–1897, 1907–1909, 1935–1936, 1957–1958, 1963–1966, 2218–2228, 2257A, 2292, 2295, 2650–2651, 2867, 2904–2907, 2915, 2935–2950, 3441–3442, 3452, 3466–3468, 3527; see also T. Tr. 1934–1938, 2277–2278, 2281, 2296; G.J. 1, 31, 74, 123, 133, 171, 190). Stenographers were present at times during the interviews with

Shaw, and, on occasion, Cantellops observed Shaw taking notes or writing while he spoke (*e.g.*, T. Tr. 1584–1585, 1907–1909, 2218–2221). Assistant United States Attorneys Tendy and Walsh also sometimes took notes while Cantellops spoke (*e.g.*, T. Tr. 1587–1589). The interview notes taken by the Assistant United States Attorneys were not specifically requested by defense counsel during the trial, nor did the petitioners complain when the notes were not produced at the trial for an *in camera* inquiry by the court.

Petitioners did not challenge on appeal from the convictions the various rulings or procedures undertaken by the court at the trial as to the production of materials under 18 U.S.C. 3500. In his petition for a writ of certiorari from the conviction, petitioner Genovese contended that there was nothing in the opinion of the court of appeals to show that the court had given consideration to the rulings of the trial judge regarding production of reports of statements of Cantellops.

b. The notes of the narcotics agents.

(1) From about mid-1957 to about March 1958, Narcotic Agents Rowan and Consoli were attached to an enforcement group which performed investigative work on the instant case directly under the supervision of Assistant United States Attorney Shaw. Rowan operated primarily as a chaperone because Shaw, who did most of the interviewing of Cantellops, would not talk to any witness in this case without someone else present (H. App. 1625–1626, 1629–1631, 1632). Rowan did some "leg work" for Shaw and

interviewed Cantellops on occasion.[13] In March or April 1958, Consoli and Rowan were assigned to a Special Squad attached to the United States Attorney's Office for further work on the case.

Rowan testified at the hearings on the motions for a new trial that in 1957 and 1958 he interviewed Cantellops on a number of occasions; that "someone" was always present with him during these interviews; and that he made notes of the interviews on most of these occasions (H. App. 1064–1067, 1071, 1074, 1076–1080, 1083–1084, 1109, 1111; see H. App. 1492). Cantellops spoke rapidly, using poor English, and it was "impossible" for Rowan to keep up with him in taking notes (H. App. 1075, 1077, 1130–1131). The notes were not verbatim (H. App. 1130, 1131). About January 1958, Rowan typed up his rough notes of these interviews, putting them into correct English, his own language, and in chronological order (H. App. 1077–1078, 1080, 1112, 1126–1127, 1131). After coming to the Special Squad, Rowan typed up his rough notes about one or two days after the interviews with Cantellops (H. App. 1083–1084). On occasion, Rowan either read parts of the notes to Cantellops or else gave them to Cantellops to read over (H. App. 1085, 1153–1154). After the completion of all of his interviews

[13] During 1957, Rowan interviewed Cantellops on about five occasions when Shaw was not present (H. App. 1630, 1631). In this same period, Shaw interviewed Cantellops about 30 or 40 times, 20 or 30 interviews dealing with this case (H. App. 1631-1633). Shaw said that he took from about one to one and one half inches of notes, that Rowan took about one tenth that thickness of notes, which were in pencil, and that all of the notes were in the case file (H. App. 1637–1638).

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with Cantellops, Rowan had a stack of rough notes about three inches thick and a stack of typed notes about half that thickness or about 40 or 50 pages of typed notes (H. App. 1085–1086).

Rowan made about three or four typewritten reports of what Cantellops had told him but he never included in those reports any of the information contained in his rough or typewritten notes (H. App. 1095, 1099, 1104, 1117, 1122; see H. App. 2058–2061). The reports gave only a "general picture" of what was happening, and one could not, on reading the reports, gain a "fair idea" of what Cantellops had said during the interviews (H. App. 1099, 1101, 1120–1122). (Substantially verbatim portions of these reports were turned over to defense counsel at the trial (T. Tr. 3172–3173; H. App. 2058–2061).)

According to Rowan, his superiors in the Narcotics Bureau—Agents Angelo Zurlo, John Enright, James Ryan, Charles Ward and George Gaffney—inquired of him as to why he had not been making reports on the case (H. App. 1108, 1113, 1116–1117, 1132–1133, 1134–1136, 1148, 1287, 1289–1290). He told them that if he made reports that they would be "liable to fall under the jurisdiction of the Jencks decision" (H. App. 1111, 1113, 1116–1117, 1140). Rowan's superiors did not directly tell Rowan not to make reports or to destroy records or notes, but Rowan had the "understanding" that he was not to make reports on the case (H. App. 1118–1119, 1161–1162). Rowan's superiors told him to do what he thought best under the circumstances or to proceed as he had been doing

(H. App. 1094, 1111, 1118, 1161). During this period, Rowan made oral reports to Zurlo concerning interviews with Cantellops (H. App. 1088–1089). Rowan explained his views on this matter to Agent Consoli and to someone else on the Special Squad but did not know whether any other agents had not been preparing reports because of this reason (H. App. 1138, 1140–1142). At about the time of the return of the indictment, Rowan destroyed his rough and typewritten notes of interviews, together with some investigative aids, in a squad room in the court house, in the presence of someone, possibly Agent Consoli (H. App. 1090, 1093, 1113, 1146, 1149, 1150–1151, 1155–1156, 1158).

In May 1958, Rowan and Assistant United States Attorney Walsh went over Rowan's notes in the light of Cantellops' grand jury testimony (H. App. 1090–1091, 1123–1124, 1145, 1249–1250). Walsh told Rowan to clear things up which were inconsistent (H. App. 1091). Rowan later assisted Walsh in writing a chronology of Cantellops' testimony which did not reflect the inconsistencies (H. App. 1123, 1145). Since this summary was not "substantially verbatim", Rowan destroyed his notes in order to circumvent the Jencks Act (H. App. 1146).

Rowan testified that he was asked to resign from the Narcotics Bureau by Agent Gaffney, and that he resigned from the Bureau on August 15, 1960 (H. App. 1162).[14] He admitted that he was involved in

[14] Agent Gaffney testified that he met with Rowan in a restaurant after Rowan had left the Bureau, and that Rowan was "upset and distraught", saying that Gaffney "had ruined

an accident with a government automobile in October 1959, and that at first he lied to Gaffney as to the circumstances of the accident (H. App. 1191–1194, 1222–1223, 1229–1230; see H. App. 1588–1590). He did not report the accident to the New York State authorities (H. App. 1204, 1224). He borrowed money from a number of other agents and once from a narcotics informer, and admitted that he did not give Gaffney a "full statement" of the money owed other agents (H. App. 1189–1191, 1221–1222). Rowan admitted that he had been late in filing his expense accounts and in his daily and monthly reports (H. App. 1148, 1290–1291). He admitted that he lied on a loan application with a finance company and that he had lied to his present employer (H. App. 1205–1206, 1229–1230). He said that he had been angry at Gaffney, that he told him that he had ruined his life, but that he had no animosity toward Gaffney (H. App. 1196). Rowan, who was under defense subpoena, said that he had received transportation money from defense counsel and that he had been promised money for the amount of time which he would lose from work testifying (H. App. 1225–1226; see H. App. 1302–1303; D. Ex. "BB").

Rowan also admitted that it was his practice to destroy his notes, after writing up of reports, even before the *Jencks* decision.

(2) Agents Enright, Ryan, Zurlo, Ward and Gaffney, who were supervisors of Rowan in the Nar-

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his life" (H. App. 1583, 1584). Rowan told Gaffney that his wife was going to leave him, that the world was coming to an end, and that everyone hated him (H. App. 1584).

cotics Bureau during the periods in question,[15] testified that they did not directly or indirectly indicate to Rowan to destroy reports, notes or documents relating to the case, or that he should not make reports (H. App. 1492–1493, 1498, 1543, 1544, 1545, 1554–1556, 1557–1558, 1564–1565, 1566–1569, 1577, 1587). The *Jencks* decision was not discussed with Rowan (H. App. 1498, 1553, 1557, 1565–1567, 1577, 1578; see H. App. 1573–1574). Rowan never discussed with them the subject of destruction of documents or sought their approval for such a suggestion (H. App. 1494, 1498, 1544, 1557, 1564–1567, 1577, 1587). Agents Enright and Zurlo, who had more immediate contact with Rowan, never saw him destroy notes (H. App. 1492, 1564–1565).[16] Rowan

[15] Enright was group leader of the Special Squad attached to the United States Attorney's Office (H. App. 1493); Ryan and Gaffney were district supervisors for the Bureau of Narcotics in New York during the periods in question (H. App. 1543, 1576–1578); Zurlo was in charge of the enforcement group to which Rowan belonged in 1957 and early 1958 (H. App. 1557); and Ward was the assistant supervisor for the Bureau of Narcotics during the periods in question (H. App. 1565).

[16] Gaffney said that discussion of such a subject was "unthinkable" (H. App. 1587), that he "absolutely" did not tell Rowan not to make reports, and that any testimony that he did so act had "no semblance of truth, not remotely" (H. App. 1588). Ryan said that he would "never tolerate" the destruction by any agent of pertinent memoranda of a case (H. App. 1544), and that if any agent testified that he, Ryan, directly or indirectly told the agent to destroy pertinent notes and memoranda, that that agent would be a "falsifier" and a "— liar" (H. App. 1554–1555). Enright said that he would not have allowed Rowan to destroy materials (H. App. 1498).

did not tell Gaffney that the reports would be made available to the defense, and Gaffney did not tell him to do what he wanted to do on the matter of reports (H. App. 1577–1579, 1580, 1587).

Agents Consoli, Muglia and Svoboda, who were associated with Rowan during the periods in question, testified they were never instructed by anyone to destroy notes, memoranda or pertinent documents, nor did they see Rowan or any other agent destroying documents in their presence (H. App. 1363, 1365–1366, 1448, 1449, 1450, 1453, 1642–1643). Consoli denied assisting Rowan in the destruction of notes of the case (H. App. 1643). Rowan was never observed possessing 40 or 50 pages of interview notes (H. App. 1365–1366, 1643). Rowan never discussed the *Jencks* decision or its effect on reports with Muglia or Consoli, and Svoboda did not recall whether he discussed that with Rowan or not (H. App. 1364, 1366, 1450, 1453, 1642). They never saw Rowan read his notes to Cantellops or give them to him to read (H. App. 1366, 1449, 1643).[17]

Shortly after this Court decided *Jencks* v. *United States,* 353 U.S. 657, the Bureau of Narcotics sent out to field offices a "legal information circular" advising of the nature and impact of the decision on

[17] Shaw did not tell Rowan or Consoli that they need not make reports, or that he would make out the necessary reports (H. App. 1625, 1627–1629, 1636). He did not discuss the *Jencks* decision with Rowan and did not instruct Rowan to destroy notes (H. App. 1625, 1627, 1628–1629). Instead, he told Rowan to retain his notes which were then made part of the case file (H. App. 1627–1628, 1637–1638).

Bureau work (H. App. 2040–2043; G. Ex. 35). On August 20, 1957, a memorandum from the Commissioner of Narcotics to District Supervisor Ryan in New York set out certain suggestions for use in the preparation of case reports, i.e., use of a new page for the testimony of each witness, the witness should sign at the end of his testimony, etc., in order to aid the Department of Justice "in its efforts to comply with its interpretation of the Jencks decision" and to "simplify the production for inspection" by the defense of case reports (H. App. 2047; G. Ex. 36). On September 9, 1957, this memorandum was adopted and put into effect by the Bureau of Narcotics (H. App. 2044–2046; G. Ex. 36). A later legal information circular advised the Bureau offices of this Court's decisions in *Palermo* v. *United States*, 360 U.S. 343, and *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395 (H. App. 2048–2049; G. Ex. 37).

The narcotic agents testified that they met regularly during the periods in question to discuss legal information circulars, Bureau matters and the like, and that some of these meetings dealt with the subject of the *Jencks* decision (H. App. 1456–1458, 1503–1504, 1546–1548, 1553–1554, 1562, 1564, 1568, 1582, 1650). After *Jencks*, the agents were instructed to concentrate on reporting facts in their reports and to omit hearsay and extraneous matter (H. App. 1544–1545, 1574–1575, 1583).

The district court found "Rowan's testimony as to his purpose at the time he destroyed the alleged notes, if in fact there were notes of the character claimed by him, unworthy of belief." 197 F. Supp. at 555.

(3) Consoli testified that he interviewed Cantellops on a number of occasions in 1958 and 1959; and that Rowan often sat in or assisted in the interviews under the practice of having two agents present. If Consoli intended to make a report to or corroborate certain data, he took longhand notes of the interviews (H. App. 823–825, 828, 865, 870–871, 897–898, 899–901, 1644, 1648–1649).[18] The notes did not reflect everything that Cantellops had said and were not verbatim. Consoli waited for Cantellops to express a "whole idea" before he wrote it down (H. App. 900–901). When he was in doubt or wanted further clarification, Consoli went over the substance of some of the notes with Cantellops or read parts of the notes back to him, but Consoli did not show the notes to Cantellops or "confirm" the notes by reading them to Cantellops (H. App. 860, 865, 871–873). Consoli used his notes in the preparation of memoranda on the case which he compared against the notes. The memoranda reflected the substance of the notes without change and were more detailed than the notes (H. App. 858, 873, 902, 1650). Consoli went over the substance of the memoranda with Cantellops, but Cantellops never

[18] A number of interview dates which Consoli had with Cantellops were for the purpose of performing "guard duty" on Cantellops (H. App. 899, 904–905). Some of Consoli's interviews with Cantellops were "lengthy", others were "very brief" (H. App. 899).

The prisoner releases of Cantellops showed that between December 13, 1957, and January 22, 1959, he was released 138 times, at least 136 of which were to narcotic agents. Consoli signed for Cantellops 37 times while Rowan signed for Cantellops 34 times (H. App. 1982-1999).

signed the memoranda or the notes (H. App. 873, 878–879). After the memoranda or reports were approved and ready for filing, Consoli destroyed his interview notes (H. App. 826, 864, 877–878, 902, 1650).[19]

Agent Muglia testified that he interviewed Cantellops on two occasions, and that he took notes of those interviews, recording the highlights of the pertinent data obtained from Cantellops (H. App. 1357–1359). Cantellops spoke rapidly, with poor pronunciation, and one had to listen "very closely" to understand what he was saying (H. App. 1358, 1366). Muglia prepared reports of these interviews, and the reports reflected the notes (H. App. 1358, 1359, 1360–1361, 1362, 1383). After the reports were approved, the notes were destroyed as a matter of routine and for security reasons (H. App. 1361, 1362, 1376–1377).[20]

The court found no bad faith in the acts of the agents and pointed out that Consoli's reports had been made available to petitioners at the trial. Substantially verbatim portions of six of Consoli's reports, four of Rowan's reports and of one of Muglia's reports (as well as other reports) were made available at the trial. See the Statement, *supra*.

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[19] The memoranda or reports indicated to an agent's superiors just what the agent was doing from time to time. The superiors could not change the facts or the substance of the reports, but merely checked them over for spelling, grammar, completeness and clarity of expression (H. App. 881, 882, 903, 1496–1497, 1543–1544).

[20] Some of the confidential reports of the Bureau of Narcotics unaccountably found their way into defense hands during the trial (see T. Tr. 1113A–1113J, 1411–1417; H. App. 1111).

c. Notes and memoranda of Assistant United States Attorney Donald Shaw.

Shaw testified that he interviewed Cantellops on a number of occasions during the investigative part of the case, and that the notes which he took of the interviews were not substantially verbatim (H. App. 1627.) He could not obtain substantially verbatim notes because Cantellops spoke rapidly and in poor English. Shaw had almost to translate what he said to put it into a more "recognizable" form (H. App. 1623). He never showed Cantellops his notes or read them back to him (H. App. 1623). He often added notes to his original notes (H. App. 1633–1634). Shaw's notes reflected what Cantellops testified before the grand jury, and the grand jury testimony of Cantellops, which was turned over to the defense at the trial, was substantially all that Cantellops had told Shaw (H. App. 1626–1627, 1640).

After about six months of investigation, Shaw prepared a chronological statement of facts of the case in which about a dozen sources of information, including Cantellops, were used (H. App. 1621–1623, 1624, 1626). Shaw used files from the F.B.I., the Bureau of Narcotics, the Customs Service and the Internal Revenue Service (H. App. 1624). The chronology was not a substantially verbatim account of what Cantellops had told Shaw (H. App. 1623).

As already noted, Judge Bicks ordered further hearing on the issue of the Shaw notes, 197 F. Supp. at 558. In August 1961, Judge Thomas Murphy was assigned the remainder of the case due to the illness of Judge Bicks (H. App. 1758).

On August 14, 1961, Judge Murphy and counsel for both sides met in open court. The government turned over to the court two envelopes of Shaw materials, one containing Shaw's original notes (H. App. 1829–1913) and the other containing Shaw's chronology of facts. The court did not believe that it was necessary to call Shaw as a witness at that time and adjourned the hearing so that it could read over the materials (T. Tr. 9785, 9787, 9789; H. App. 1778, 1780, 1782–1783).

On December 22, 1961, Judge Murphy ruled that the defense requests at the trial for production of statements and reports of government agents who interviewed Cantellops covered the Shaw materials and that the government should have turned over those materials for an *in camera* inspection. He ruled, however, (1) that the chronology of facts was not substantially verbatim of what Cantellops had said, was not written contemporaneously with the interviews, and that, in any event, since the notes from which information was taken and incorporated into that chronology exist, petitioners would not have been entitled to the chronology; (2) that with the exception of the notes of October 10 and 11, 1957, "virtually the entire contents" of the remaining notes corresponded with Cantellops' grand jury testimony, which had been turned over to the defense at the trial, and hence the defendants in effect already had what the notes contained; (3) and that while the notes of October 10 and 11, 1957, should have been made available to the defense at the trial, their nonproduction did not prejudice petitioners or influence the result. 200

F. Supp. 711. In this regard, the court noted that Cantellops had admitted that he lied before the grand jury in July 1957 and March 1958; that Cantellops testified that he put into operation a preconceived plan to stall for time during which he was to advance any story until he could be reached with bail money or legal assistance by others; that Cantellops was not co-operating during this period; and that it would be "difficult to see how an additional instance of fabrication, not under oath and at a time, consistently, when he was not yet cooperating with the government, could persuade the jury differently" (H. App. 1792–1793). Judge Murphy held that the cross-examination of Cantellops was not "unduly restricted" by the non-production and noted that Cantellops had been subjected to an exhaustive and searching cross-examination for 14 days (H. App. 1792, 1793). The court then denied the remainder of the motions for the new trial, ordering that copies of the October 10 and 11, 1957, notes of Shaw be turned over to defense counsel. 200 F. Supp. 711.

The court of appeals, on February 23, 1962, granted petitioner Genovese's motion to release the remaining notes to the extent that Judge Murphy, in his discretion, might conclude that they were producible Jencks materials (C.A.R. 34). On May 7, 1962, Judge Murphy released 61 pages of Shaw notes (H. App. 1853–1913), noting that he "deem(ed) it more expedient to resolve them in favor of disclosure at this juncture without the delay and expense that a hearing for that purpose would entail." (T. Tr. 9893–9894). He refused to make available 18 pages

of "cryptic or cabalistic notes that never were, and are not now considered by us to be producible" (T. Tr. 9893).

ARGUMENT

1. The conclusion of Judge Bicks, who had presided at the original trial, that the new evidence adduced before him did not warrant a new trial (challenged only by the petitioners in No. 1167 and No. 1515 Misc.) [21] presents no issue for review by this Court. *United States* v. *Johnson*, 327 U.S. 106, 111. The opinion of the district court which reviews the evidence in detail (197 F. Supp. 536) indicates a careful exercise of discretion with respect to matters which are the peculiar province of the district court. See *Campbell* v. *United States*, No. 631, O.T. 1962, decided May 27, 1963.

2. The major complaint of all petitioners arises from the fact that the government at the trial did not turn over to the court the notes taken by Assistant

[21] While petitioner Genovese (whose arguments are adopted by the others) does not here seek further review of the rulings made upon the record as it existed before Judge Bicks, he seeks "to preserve if necessary a claim for remand for further consideration of such grounds" (No. 1168, p. 6). He contends (No. 1168, pp. 43–44) that if the Court holds that the defense was not prejudiced by the nonproduction at the trial of the notes of Assistant United States Attorney Shaw, the Court should nevertheless remand the case to the district court for consideration of the notes (1) as "further evidence" on the first five grounds of the new trial motion and (2) as "evidence on other grounds of the new trial motion", i.e., "newly discovered" pre-trial contradictory statements. We show *infra* that the Shaw notes are neither newly discovered nor significant.

United States Attorney Shaw. In this connection, it is important to bear in mind that the instant proceeding relates to a motion for a new trial based on newly discovered evidence. The question is not whether the failure to turn over the materials was error, but whether it is such a serious error as to justify setting aside a judgment which has already been reviewed on appeal. The conclusion of the courts below that it was not is plainly correct.

a. That Shaw did interview Cantellops and take notes can in no sense be deemed newly discovered evidence. As shown by the Statement, *supra,* Cantellops testified at the trial that between mid-1957 and into 1958, he had been interviewed by Assistant United States Attorney Shaw; that Shaw had examined him before the grand jury; and that, on occasion, he observed Shaw writing or taking notes during interviews. No specific request was made for the Shaw notes or the notes of any Assistant United States Attorney, nor did petitioners voice any complaint at the trial or upon appeal from the convictions that the Shaw notes had not been produced at the trial. Judge Murphy ruled that, while defense counsel knew that Shaw had taken notes of his interviews with Cantellops and "nonetheless did not make a specific demand for the assistant's notes or for a *voir dire* with respect thereto",[22] nevertheless, the de-

[22] Petitioners Mazzie, Charles Di Palermo and Joseph Di Palermo misstate the record when they assert that they were not aware of the Shaw materials at the trial (No. 1329 Misc., p. 8; No. 1330 Misc., p. 8; No. 1475 Misc., p. 8).

These same petitioners, on page 10 of their respective petitions, state that, when the question of the *voir dire* into the Shaw materials "came before Judge Murphy on August 14, 1961, the govern-

fense demands for statements and reports were broad enough to encompass the Shaw materials and that, consequently, "wrongful or negligent non-production on the part of the government" would be assumed 200 F. Supp. at 714. We accept the assumption for present purposes, although it is only fair to the attorney involved to point out that the instant trial was concluded in April 1959, before the decision of this Court in *Palermo* v. *United States*, 360 U.S. 343, at a time when the term "substantially verbatim" was thought to mean the equivalent of a stenographic recording.[23] The question remains whether the failure to turn over documents known to exist, which was

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ment urged that there was no need to hold a further hearing on this matter." The record, however, shows that after producing the Shaw materials in open court on that day, government counsel represented to the court that the "Government has outside Mr. Shaw, who has prepared those notes. He is available to the Court, if the Court wishes to examine him" (H. App. 1761, 1762). Judge Murphy concluded that the first thing that he should do was to read the notes (H. App. 1780, 1782–1783.

[23] At the trial the government turned over to the defense Cantellops' entire grand jury testimony consisting of 312 pages; two question and answer statements from Cantellops; Veteran's Administration medical records regarding Cantellops; Rickers Island medical records of Cantellops when he had been incarcerated there earlier; and portions of numerous reports of narcotic agents. See 197 F. Supp. at 558, fn. 23. The government had turned over to the court for an *in camera* inspection the entire files of the New York Branch of the Bureau of Narcotics regarding the case, and the court, after having spent about thirty hours examining the file, conducted *voir dire* examinations of five narcotics agents (T. Tr. 2013–2042, 3159–3173) in order "to aid the court in determining whether any of [the reports came] within subdivision 1 and 2 of (e) of Section 3500" (T. Tr. 2013).

unchallenged on appeal, requires the granting of a motion for a new trial.

b. Under the ruling of this Court in *Campbell* v. *United States*, No. 631, O.T., 1962, decided May 27, 1963, we accept Judge Murphy's findings that the Shaw notes should have been produced under 18 U.S.C. 3500. There is thus no occasion to consider whether the court of appeals applied an improper standard in reviewing these findings, or whether the court of appeals improperly defined and applied the term "substantially verbatim" in section 3500(e)(2), contentions advanced for consideration by petitioners. This Court, in *Campbell*, held that the factual findings and legal conclusions of the district judge in such matters are to be sustained on appellate review unless "clearly erroneous".

It is our position that this standard also applies to the ruling that failure to produce the Shaw documents does not justify a new trial. We think the record here establishes that Judge Murphy's finding that petitioners were not prejudiced was not clearly erroneous; that it was in fact clearly correct.

c. As shown by the Statement, *supra*, Judge Murphy divided the notes into two categories: (1) the October 10 and 11, 1957, notes, consisting of 24 pages; and (2) the remaining notes, consisting of 61 pages. As to the 61 pages,[24] Judge Murphy held that petitioners were not prejudiced by their nonproduction

[24] Actually, there were only about 22 actual pages of notes of October 10 and 11, 1957, because some of the notes were contained on half-pages or less (see H. App. 1836, 1851, 1852). There were, for the same reason, only about 57 actual pages of notes in the other category (H. App. 1853, 1861, 1866, 1888, 1899).

because virtually the entire contents of these notes correspond with Cantellops' grand jury testimony, which had been turned over to the defense at the trial (H. App. 1789). As to the notes of October 10 and 11, he concluded that denial of access did not influence the result. See 200 F. Supp. at 715–718. To this we add that there could not have been any prejudice to the petitioners in this regard because they had already received (and utilized) at the trial other materials pertaining to Cantellops which contained practically the *entire substance* of the information contained in the Shaw notes. See *Killian* v. *United States,* 368 U.S. 231, 244; *Rosenberg* v. *United States,* 360 U.S. 367, 370–371. The basis for these assertions is documented in detail below.

The 61 pages of notes. These notes covered interviews with Cantellops from July 26, 1957 to March 1958 (see H. App. 1853, 1879). Almost their entire substance was contained in Cantellops' July 30, 1957, and March 1958 grand jury testimony which was turned over and utilized by the defense at the trial. Thus the grand jury testimony and the notes indicated that Sol Colletti in 1956 sold narcotics obtained from Ralph Polizzano to Cantellops (G.J. 3–5; compare H. App. 1856–1857); that Cantellops purchased from two to three ounces of narcotics per week from Colletti and resold it to some pushers in Spanish Harlem (G.J. 4–5, 8; compare H. App. 1857); that Cantellops sold narcotics to individuals named Mario and Sienedy (G.J. 5; compare H. App. 1857); that Cantellops met Colletti at a certain gasoline station and picked up narcotics from him there

(G.J. 5–6; compare H. App. 1858); that Cantellops ordered narcotics from Colletti by using a poker game code (G.J. 6; compare H. App. 1858); that about a week before Colletti was arrested Cantellops met Ralph Polizzano at the gasoline station (G.J. 5, 6; compare H. App. 1858); that Ralph Polizzano offered Cantellops a better price for the narcotics (G.J. 6; compare H. App. 1858); that Cantellops thereafter purchased narcotics regularly from Ralph Polizzano during 1956 (G.J. 7; compare H. App. 1859, 1861); that Colletti became angry when he discovered that Cantellops had been purchasing narcotics from Ralph Polizzano (G.J. 8; compare H. App. 1858); that Cantellops contacted Ralph Polizzano two to three times a week regarding narcotic transactions, paying Polizzano directly for narcotics (G.J. 10–12; compare H. App. 1859); that Jack Russo delivered narcotics for Ralph Polizzano to Cantellops at a certain luncheonette (G.J. 10–11; compare H. App. 1859); that Willie Rovira, who owned the Lolita Bar, gave Cantellops some marijuana cigarettes, which he said he had obtained in Chicago from a Mexican syndicate (G.J. 11–12; compare H. App. 1860); that after Cantellops had been released from prison in February 1957 (following a conviction for a marijuana violation), he began to purchase narcotics from Ralph Polizzano again (G.J. 12–13; compare H. App. 1862); that Cantellops mixed the narcotics in Carlos' apartment and "bagged" it on occassion in Victoria's apartment (G.J. 14–15; compare H. App. 1862–1863); that Acevedo, who had sold narcotics for Cantellops, discussed narcotics with him in a bar (G.J. 16–18; com-

pare H. App. 1865); that Cantellops met Barcelona in 1955, and, after discussing a crooked gambling device of Cantellops with him, borrowed $500 from Barcelona (G.J. 31–34; compare H. App. 1868–1870); that Barcellona told Cantellops that he could repay the loan by delivering narcotics to Las Vegas for him (G.J. 34–36; compare H. App. 1870–1871); that Barcellona instructed Cantellops on certain details of the trip (G.J. 35, 39, 221; compare H. App. 1870–1874); that, as Cantellops was conversing with Barcellona about the Las Vegas trip, a young Italian man approached and gave Cantellops a package of narcotics (G.J. 39–40; compare H. App. 1874, 1880); that Cantellops traveled to Las Vegas by way of Los Angeles and Reno (G.J. 38, 39, 222; compare H. App. 1867, 1874–1877); that Cantellops rented a room near the Golden Nugget Casino where he shortly thereafter obtained employment (G.J. 41–42, 223; compare H. App. 1877–1878); that Cantellops delivered a package of narcotics to an Italian man who was about 40 years of age, with black-grey hair which parted down the middle (G.J. 42; compare H. App. 1880); that in the summer of 1956, Cantellops traveled to Miami where he met Carmine Polizzano who, with Cantellops, drove to Tampa where Polizzano entered a certain hotel (G.J. 48, 51–52; compare H. App. 1881–1882); that some "luggage" containing narcotics was subsequently picked up from a middle-aged Cuban (G.J. 52–53; compare H. App. 1883); that Polizzano and Cantellops returned to Miami where Polizzano purchased a train ticket for Cantellops (G.J. 53–54; compare H. App. 1883); that Cantellops returned to New

York and subsequently received a "tip" of narcotics (G.J. 54–56; compare H. App. 1884); that Cantellops diluted this "tip" of narcotics and sold it (G.J. 60; compare H. App. 1884); that Cantellops then travelled to Chicago with a package of narcotics, met Carmine Polizzano and another man there, and subsequently delivered the package to the man by leaving it in a telephone booth (G.J. 66–68; compare H. App. 1885–1886); that, in the summer of 1956, Cantellops met Ormento and a Mexican, and the men discussed a pickup of narcotics from Mexico, which Cantellops refused to go along with because of the absence in the plan of certain details (G.J. 133–135; compare H. App. 1889–1892, 1900–1901); that Cantellops thereafter met in a hotel room with Ormento, Mazzie and the Mexican, and the trip to Mexico was again discussed (G.J. 135–137; compare H. App. 1892, 1902–1905); that Cantellops thereafter met in a hotel room with Ormento, Mazzie, Santora and the Mexican, and the decision was made for Cantellops to pick up the narcotics again in Miami (G.J. 137–139; compare H. App. 1892–1894, 1907–1909); that Cantellops thereafter traveled to Miami where he picked up narcotics in some "luggage" and returned to New York (G.J. 139–141; compare H. App. 1895–1896); that Cantellops delivered the "luggage" to a man near a gas station on Boston Road in New York City (G.J. 141–142; compare H. App. 1896-1899); that Cantellops, while in the company of Ormento and others, had seen Genovese in a restaurant on the east side (G.J. 118; compare H. App. 1908); and that, after meeting with Evola, Ormento and

Mazzie, Cantellops delivered narcotics at a gasoline station in the vicinity of Stockholm and Stanhope Streets in Brooklyn (G.J. 191–192; compare H. App. 1911–1912).

The notes of October 10 and 11, 1957, consisting of 24 pages. The notes of October 10 and 11, 1957, which Judge Murphy held should have been produced at the trial, were devoted almost exclusively to the Las Vegas trip and a Miami-Tampa trip, and with Cantellops' dealings with Ralph Polizzano and one Conrad De la Cruz (H. App. 1824–1852). Practically the entire substance of the notes was contained in other materials which were made available to, and utilized by, the defense at the trial, *i.e.*, two question and answer statements taken from Cantellops (one of which was made before Shaw on October 10, 1957, the very day that Shaw took some of the interview notes in question); Cantellops' grand jury testimony; and portions of reports by narcotic agents turned over to the defense.

In this regard, petitioners were well aware at the trial that Cantellops had told government agents or the grand jury that he had met Conrad De la Cruz in 1955 (H. App. 2050, 2056; compare H. App. 1829); that De la Cruz and Ralph Polizzano were in the narcotics business together (H. App. 2051, 2052; compare H. App. 1829, 1834–1835, 1846, 1848); that Ralph Polizzano, in a meeting with Cantellops at the Old Landmark Bar, asked Cantellops whether he would make a pickup of narcotics in Miami (H. App. 2051–2052; compare H. App. 1829, 1834–1835); that Ralph Polizzano told Cantellops to meet De la Cruz at the

Almanac Bar and that De la Cruz would give Cantellops the details of the trip (H. App. 2052; compare H. App. 1835); that Cantellops, on the following day, met De la Cruz in the Almanac Bar (H. App. 2052; compare H. App. 1835); that De la Cruz and Cantellops discussed narcotics, with De la Cruz telling Cantellops that he did not have to know too much about the subject in order to make the trip (H. App. 2053; compare H. App. 1835); that De la Cruz gave Cantellops a slip of paper with an address and told him to take a taxi to that address when he arrived in Miami (H. App. 2052; compare H. App. 1836); that De la Cruz gave Cantellops expense money and a bus ticket to Miami (H. App. 2052; compare H. App. 1836, 1837); that Cantellops thereafter traveled alone to Florida by Greyhound bus (H. App. 2051, 2052; G.J. 182; compare H. App. 1837); that Cantellops met De la Cruz on the Florida end of the trip (H. App. 2051; compare H. App. 1838, 1841, 1842–1844); that Cantellops picked up narcotics in an old suitcase in Tampa (H. App. 2051; G.J. 183, 186; compare H. App. 1841, 1844); that De la Cruz was in the area when Cantellops picked up the narcotics (H. App. 2051; compare H. App. 1841–1842); that Cantellops thereafter returned to New York by train and gave the narcotics to Ralph Polizzano (H. App. 2051; compare H. App. 1845, 1847); that the Florida trip was at the behest or for the benefit of Ralph Polizzano and De la Cruz (H. App. 2051–2053; compare H. App. 1834–1835, 1844, 1846–1848); and that Ralph Polizzano gave Cantellops a "tip" of heroin which Cantellops diluted and sold (G.J. 188; compare H. App. 1847–1848,

1850). Only insignificant details of the Miami trip were not in the other documents petitioners were given. They did not have, for example, the information that Cantellops spent 8–10 hours on the bus to Tampa; that Cantellops and De la Cruz returned from Tampa to Miami by automobile; that they stopped en route to Miami for some coffee; that De la Cruz purchased Cantellops' train ticket to New York; and that the "luggage" of narcotics weighed four to five pounds (see H. App. 1840, 1841, 1842–1844).

As for the Las Vegas trip, petitioners knew that Cantellops had said that he agreed to deliver narcotics to a man in the Golden Nugget Casino in Las Vegas for $1,000 (G.J. 35–36, 38–40, 41; H. App. 2056, 2060; compare H. App. 1830); that Cantellops, carrying narcotics, left the New York area on a flight to Los Angeles and from there by flight to Reno (H. App. 2038–2039, 2054, 2059, 2060, 2061; G.J. 38, 39, 40, 221–222; compare H. App. 1830–1831, 1837); that Cantellops traveled by bus from Reno to Las Vegas (G.J. 38, 223; compare H. App. 1831); that Cantellops rented a room in a rooming house which was located a few blocks from the Golden Nugget Casino in Las Vegas (G.J. 41, 222; compare H. App. 1830, 1831); that Cantellops thereafter obtained employment in the Golden Nugget Casino (H. App. 2039; G.J. 41, 223; compare H. App. 1831, 1832); that Cantellops subsequently delivered the package of narcotics which he had brought with him to an Italian-looking man whom Cantellops had met at the Golden Nugget Casino earlier (H. App. 2038–2039, 2056; G.J. 42–43; see G.J. 223, 225; compare H. App. 1831–1832); and that,

after having worked for about a week at the Casino, Cantellops returned to New York where he was later paid (H. App. 2038–2039; G.J. 41, 44, 223–224; compare H. App. 1832, 1833).

As for the remaining areas in the notes, petitioners already possessed information that Cantellops had narcotic dealings with Ralph Polizzano, Conrad De la Cruz, Guayamita and Sol Colletti (*e.g.*, G.J. 4–5, 7–8, 9–15, 37, 44, 124–129, 177; H. App. 2050–2053, 2057, 2060; compare H. App. 1829, 1833); that Cantellops had been released from prison on February 11, 1957 (G.J. 12; compare H. App. 1834); that, after Cantellops' release, Ralph Polizzano offered to help Cantellops get back into the narcotics traffic and extended to him some "credit" (G.J. 12, 22, 28; compare H. App. 1834); that Cantellops mixed narcotics in Carlos' apartment (G.J. 14, 15; see G.J. 46, 225; compare H. App. 1850); that Cantellops bagged narcotics and sold it in New York City (*e.g.*, G.J. 8, 13, 14, 188, 203–207; compare H. App. 1850-1851); that Ralph Polizzano had a narcotics "plant" in a basement area near a certain restaurant and received narcotics from Cantellops there (G.J. 9, 188; compare H. App. 1847–1848); that Cantellops discussed narcotics with Ralph Polizzano and that Aviles was in the narcotics traffic (*e.g.*, G.J. 212–213; compare H. App. 1829, 1834, 1846–1848, 1850); that Cantellops mentioned the name of Willie "Rovera" and establishments called the "Lolita" and "Gallo De Oro" (G.J. 11, 12, 205, 206–208, 209, 215; compare H. App. 1851, 1852); that "Junior" worked as a runner for Ralph Polizzano (*e.g.*, G.J. 14, 21–23, 28, 205; H. App. 2056; compare H. App. 1846); that a certain gasoline station or

garage was used for the consummation of narcotic transactions (G.J. 5–6; compare H. App. 1847); and that the Old Landmark Bar and the Squeez-Inn Bar figured prominently in narcotic discussions (*e.g.*, G.J. 5–6, 9, 33, 48, 87, 180; H. App. 2051, 2060; compare H. App. 1834, 1845, 1849).

The only significant area of the notes which petitioners did not already possess in one form or another was Cantellops' assertion that De La Cruz instructed him before he made the Las Vegas trip (cf. G.J. 39–40, 221); that he carried the package of narcotics by strapping it to his back (cf. G.J. 40, 223); that De La Cruz wanted Cantellops to remain in Las Vegas (cf. G.J. 43); and that De La Cruz paid Cantellops the $500 after his return (cf. G.J. 44, 224) (see H. App. 1830, 1833). However, Cantellops testified that during the period when the notes at issue were made, he was "not cooperative" with the government (*e.g.*, T. Tr. 1858). Indeed, Cantellops had been instructed by members of the syndicate to put up "any story" until he could be reached with legal aid or money, instructions which Cantellops put in operation during this period (*e.g.*, T. Tr. 1155–1156, 2904–2905).

Cantellops did not begin to cooperate with the government until about March 1958 when, in a series of grand jury appearances, he implicated all the petitioners except Genovese and Gigante. He did not implicate those petitioners before the grand jury until June 1958, explaining that these men comprised "one of the most dangerous sections of this syndicate", that this had worried him for quite some time, that there was personal danger in exposing these men, but that,

regardless of the personal risk, he would "go ahead and help to the full extent" (G.J. 232–233). Before the jury, counsel hammered again and again at instances of Cantellops prior grand jury perjury and inconsistent statements (*e.g.*, T. Tr. 1838–1839, 1855, 1858, 1868–1872, 1873, 1956, 1963, 2253–2254, 2388, 2411–2413, 2463–2464, 2610–2611, 2659, 2810–2814, 2830–2831, 2869, 2871, 3031–3033, 3122–3123, 3125–3127, 3387, 3443). The record shows that Cantellops was subjected for 14 trial days to a most exhaustive and gruelling cross-examination by able and experienced counsel, who, with wide latitude granted by Judge Bicks, inquired into practically every aspect of Cantellops' background, character, activities both within and outside of the law and matters affecting his credibility as a witness. More than one fifth of the approximately 7,500 page transcript was devoted to cross examination of Cantellops by individual attorneys for the petitioners and others. Under these circumstances the very limited information available only in the Shaw notes was properly held to be unimportant.

3. The destruction of notes by narcotics agents after their reports had been prepared presents no issue warranting review.

a. As to Muglia and Consoli, it is not claimed that there was any bad faith in the destruction of the notes. The reports which were prepared from the notes and turned over to the defense at the trial contained lengthier and more detailed recitals of everything contained in the notes. There was thus no reason to preserve the notes, and certainly failure to do so was no ground for setting aside the conviction. *Killian* v. *United States*, 368 U.S. 231, 242–244.

b. As to Rowan's notes, petitioners are incorrect in their assertion that there is with respect thereto any issue of destruction in bad faith. Judge Bicks found that Rowan had not destroyed those notes—if, indeed, such notes had ever existed [25]—in bad faith. Simply

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[25] Doubt was cast as to the very existence of the 40–50 pages of typewritten notes because none of the other agents ever observed Rowan in the possession of that quantity of notes, and Shaw testified that when he sat down to write a chronology of the facts of the case during the first quarter of 1958, Rowan gave him (Rowan's superior) only about *five pages of typewritten notes* which were of no use to Shaw because they were "cursory and without detail" (H. App. 1365–1366, 1621–1622, 1636, 1643). Although Rowan testified that on occasion he read parts of his notes to Cantellops for clarification or else gave some of the notes to Cantellops to read over (H. App. 1085, 1153–1154), none of the other agents on the Special Squad, including Agent Consoli who had worked with Rowan under Shaw before their assignment to the Special Squad, ever saw Rowan read any of his notes back to Cantellops or give notes to Cantellops to read over (H. App. 1366, 1497–1498, 1643). This was particularly significant since Rowan admitted that he "never was alone with [Cantellops]" (H. App. 1066–1067). Rowan's testimony that on occasion and in the actual presence of Consoli he typed his notes during actual interviews with Cantellops (H. App. 924–925) was contradicted not only by Consoli (and other agents and Shaw) but by the fact that there was no typewriter in the room at the courthouse where Rowan conducted these interviews (H. App. 860–861, 1449–1450, 1637, 1643). Significantly, none of the petitioners thought to recall Cantellops, who was their witness at the hearings, to ask him whether Rowan showed him his interview notes, whether Rowan read the notes back, or whether Cantellops had read them. Cantellops had testified at the trial that he had been interviewed several times by Rowan, and on occasions by other narcotic agents: that he did not know precisely which of the agents had taken notes; and none of the agents showed him any notes and he had not read any of them (*e.g.*, T. Tr. 1585–1586, 1910–1911).

put, Judge Bicks did not believe Rowan, a witness he found to have an "utter lack of veracity and regard for the testimonial oath" and whose testimony was "unreliable to the last degree." 197 F. Supp. at 556–557. Judge Bicks pointed out that a far more plausible explanation for the destruction of any notes was simply that they were destroyed in accordance with Rowan's invariable practice before there was a *Jencks* decision. During the period in question, Rowan wrote four reports from his notes, about the same number of reports as were submitted by other similarly situated agents (see, *e.g.*, T. Tr. 2013–2018, 2019–2025, 2033–2037, 2042–2044). Substantially verbatim portions of each report were turned over to the defense at the trial (T. Tr. 3172–3173; H. App. 2058–2061). Thus, the situation as to Rowan is the same as to the other agents. The defense received reports embodying the notes, but not the underlying notes which were destroyed after the reports were prepared.

CONCLUSION

For the reasons stated, we respectfully submit that the petitions for writs of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 196

VITO GENOVESE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

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The government's argument, in response to the six questions presented in this petitioner's Petition for Certiorari, may be summarized as follows:

(1) On the first question, the government has acknowledged error by the court of appeals (Br. Opp. 36).[1] The government concedes that the court of ap-

[1] The Brief in Opposition will be cited herein as "Br. Opp.". This petitioner's Petition for Certiorari will be cited "Pet.". Record references will be cited in the same manner employed in the petition (Pet. 5, n. 1). The additional references "G.J." and "G. App." will be used in the same manner as in the Brief in Opposition (Br. Opp. 2, n. 1).

For reasons appearing in the text, *infra*, extensive reference will be made to the briefs filed by petitioner and respondent in the court below. These will be cited as "Pet. CA Br.", "Gov. CA Br.", and "Pet. CA Reply Br.". Copies of these briefs were lodged with the Clerk of this Court upon the filing of the petition for certiorari (Pet. 12). Nine additional copies of petitioner's brief below are being lodged herewith.

peals' finding that the Shaw notes were not producible under the Jencks Act cannot stand. However, the government urges that the judgment be sustained on a different ground, that deprivation of the notes was non-prejudicial (Br. Opp. 36-46), although, as will be shown below, the government abandoned that ground in the court of appeals.

(2) and (3) In view of its concession with regard to question 1, that the court of appeals erred in holding the Shaw notes not within 18 U.S.C. § 3500, the government finds it unnecessary to discuss questions 2 and 3 of the petition, which seek review of the appellate court's narrow definition of "substantially verbatim" statements under § 3500(e)(2) (Br. Opp. 36).

(4) The Brief in Opposition is silent upon the issue raised by question 4 of the petition, namely, whether the prosecution's suppression of notes producible under the Jencks Act constitutes a due process violation under *Brady* v. *Maryland*, 373 U.S. 83 (1963).

(5) The government opposes review of the issue presented by question 5 of the petition, and previously left open by this Court in the *Campbell* cases: whether pre-trial destruction of a government agent's interview notes constitutes a violation of Jencks Act rights in the case of (a) good faith destruction and (b) bad faith destruction. *Campbell* v. *United States* (*Campbell* I), 365 U.S. 85, 98 (1961); *Campbell* v. *United States*, 373 U.S. 487, 491 (1963). The government takes the position that the destruction entailed no prejudice, since "The defense received reports embodying the notes . . . which were destroyed after the reports were prepared." (Br. Opp. 48.)

(6) The issue raised by question 6 of the petition is answered only in a footnote (Br. Opp. 33, n. 21).

Petitioner's contention that, on remand, the previously withheld Shaw notes should be considered as evidence on the remaining grounds of the new trial motion, is met by the contention: "We show, *infra,* that the Shaw notes are neither newly discovered nor significant." (*Ibid.*) However, the discussion "*infra*" never considers the significance of the Shaw notes in relation to the evidence on the new trial motion, but only in regard to the trial and grand jury testimony.

In view of the government's concession—if not confession—of error as to the sole ground upon which it prevailed in the court of appeals, petitioner submits that the grant of certiorari is plainly warranted. This reply brief will deal largely with the alternative ground upon which the government now seeks to sustain the judgment, namely that the wrongful failure to produce Shaw's notes under the Jencks Act did not prejudice the defendants. Petitioner will seek to demonstrate that this ground is so tenuous, and so at variance with the government's position on the same point in the court of appeals, that summary reversal may be appropriate.

I. THE GOVERNMENT'S CONCESSION OF ERROR

The government recognizes that, "The major complaint of all petitioners arises from the fact that the government at the trial did not turn over to the court the notes taken by Assistant United States Attorney Shaw." (Br. Opp. 33-34.) The sole basis upon which the court of appeals rejected this principal contention of petitioners was that Shaw's notes contained no statements producible under the Jencks Act (Pet. 9a-11a). The appellate court expressly rejected Judge

Murphy's contrary findings and made a *de novo* determination "with respect to this factual issue" (Pet. 9a).

The government now concedes that the court of appeals' decision of this issue was erroneous.

> "Under the ruling of this Court in *Campbell* v. *United States,* No. 631, O.T., 1962, decided May 27, 1963, we accept Judge Murphy's findings that the Shaw notes should have been produced under 18 U.S.C. 3500." (Br. Opp. 36.)

The government thus accepts the contention made in support of granting certiorari on the first of the questions presented: that the court of appeals improperly rejected the district court's findings that defendants were deprived of notes producible under the Jencks Act, 18 U.S.C. § 3500(e)(2) (Pet. 16-22).

The government suggests that, by accepting Judge Murphy's findings that the Shaw notes were producible under § 3500, it has rendered unnecessary a consideration of whether the court of appeals erroneously reviewed those findings (Br. Opp. 36). But in a striking *non sequitur* to its concession of error, the government urges that certiorari to correct the error be *denied,* and the erroneous precedent thus left to stand. Petitioner submits that the concession plainly warrants a grant of certiorari, since it removes the only basis upon which the government prevailed below.

Moreover, it seems singularly inappropriate for the government to ask this Court, as the sole basis for denying certiorari, to pass upon a contention as to lack of prejudice which the government never briefed or argued below—and which rests upon analysis and comparison of some 75 items in the Shaw notes, and more than 250 record citations (see Br. Opp. 37-46). Such

a basis for sustaining the judgment should be considered, if at all, only upon reaching the merits, not upon opposition to certiorari. However, in petitioner's view, the grant of certiorari may not call for plenary examination of the government's contention on the merits, but for summary reversal. Petitioner urges summary reversal on two bases: (1) the government's failure to urge below the sole ground upon which it now seeks to sustain the judgment; (2) such ground's demonstrable lack of merit. These points are developed in Parts II and III,[2] respectively, of this reply brief.

II. THE GROUND UPON WHICH THE GOVERNMENT NOW SEEKS TO SUSTAIN THE JUDGMENT WAS ABANDONED IN THE COURT OF APPEALS

If the government's elaborate argument on harmless error (Br. Opp. 36-46) possesses any merit, it is plainly one that should have been presented to the court of appeals—and to Judge Murphy in the district court. Yet it is made here for the first time, and in conflict with the government's position in the court of appeals.

In briefing before Judge Murphy the several grounds upon which it relied in opposing the new trial motion,

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[2] The argument in Part III might appropriately be deferred until consideration of the merits. However, unlike the government's task of showing that there was *no* prejudicial error—which requires an examination of all of the Shaw notes, and a comparison of each item with allegedly like information in other documents—petitioner can refute the government's position by instancing merely a few situations in the record in which items from the Shaw notes contained impeachment material not otherwise available. Under *Rosenberg* v. *United States*, 360 U.S. 367 (1959), discussed in Part III-C, *infra*, the erroneous withholding of Jencks statements may be deemed harmless error only where the defense has received "the same information" from other sources.

the government did not set forth the harmless error ground upon which it now relies.[3] Judge Murphy, however, rejected the grounds upon which the government did rely, and denied the motion on the ground that defendants had not been prejudiced by the wrongful withholding of Shaw's notes (see Pet. 11-12, 5a-6a). This ruling by Judge Murphy was made without benefit of argument by either side as to the contents of the notes. No such argument could have been made by petitioner, since defense counsel had not yet been allowed to see the notes (see Pet. 13, n. 10). The government, which had access to the notes, for reasons best known to itself did not attempt to demonstrate any alleged similarity between their contents and other materials furnished to the defense. Nevertheless, the legal

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[3] The government's brief before Judge Murphy concluded:

> "In conclusion it is respectfully submitted that petitioners' motion for a new trial must be denied, without a further hearing, on any one of the following independent grounds: (1) that no request was made at trial for the production of the Assistant United States Attorney's notes or chronology; (2) that there is no 'newly *discovered*' evidence presented by petitioners on the newly *alleged* non-production of the attorney's notes; (3) that petitioners have failed to exercise diligence in obtaining the 'new' evidence, and in raising the issue of non-production; (4) none of the notes or chronology constitute a 'substantially verbatim recital' of the witness' oral statements; and (5) it would be against the established policy of the law and the legislative history of § 3500 to allow the examination by opposing counsel of a lawyer's work product prepared to aid him in the conduct of his case." Brief in Opposition to Petitioners' Motion for a New Trial on the Ground of Newly Discovered Evidence, p. 58 (quoted in Pet. CA Reply Br. 2, n. 2; emphasis in original).

Similarly, at oral argument prior to filing of the above-quoted brief, the government did not argue harmless error (see 1771a).

conclusion that defendants were not prejudiced by the lack of Shaw's notes—reached without any hearing on what the notes contained—the government claims should be sustained unless "clearly erroneous" (Br. Opp. 36). Also remarkable is the government's threshhold contention, that the "clearly erroneous" standard of review (heretofore applied to factual findings) extends to "legal conclusions" (see *ibid.*).

In the court of appeals, as its opinion noted, petitioner directed his "major attack upon the order of Judge Murphy below" to "the issue of harmless error" —the sole issue concerning Shaw's notes upon which Judge Murphy had ruled against the defendants (Pet. 6a; see also Pet. 12). Petitioner's appellate brief pointed out in detail the manner in which the suppressed notes differed from Cantellops' grand jury testimony and impeached his trial testimony (Pet. CA Br. 66-95, 37-59). Petitioner also contended that Judge Murphy had applied an erroneous test of prejudice, instead of that adopted by this Court in *Rosenberg* v. *United States*, 360 U.S. 367 (1959) (Pet. CA Br 16-37, 60-65). ***But the government's 99-page brief below was silent upon the harmless error issue.*** The government disputed neither petitioner's contention that Judge Murphy had applied an erroneous standard of harmless error, nor his contention that the record showed sufficient prejudice to meet both the standard adopted by Judge Murphy and that of *Rosenberg* v. *United States*. This failure to reply was also noted in the petition for certiorari (Pet. 12), and supported by lodging copies of the appellate briefs filed by petitioner and the government (see n. 1, *supra*). A comparison of those briefs makes patent that the government deliberately declined to defend Judge Murphy's

ruling on the harmless error issue—the very ruling which it now contends "was in fact clearly correct" (Br. Opp. 36).

The silence of the government's brief was repeated at the oral argument. It was broken only when government counsel was pressed by the court, at the close of his argument, to state whether he would defend Judge Murphy's ruling. Government counsel then conceded that, in his view, Judge Murphy was "wrong" in everything but the result he reached. Court reporter's transcript of oral argument (lodged with this Court) at 120-22.[4] Orally, as in brief, government counsel de-

[4] The full colloquy on the point is as follows, between the court and government counsel, Arnold N. Enker, then Chief of the Appellate Section in the office of the United States Attorney for the Southern District of New York:

"JUDGE WATERMAN: Judge Marshall and I have interrupted with some questions and your hour is almost up, and I will give you some more minutes. But I do think probably it would be a little more orderly if I ask is somebody going to defend Judge Murphy? Unfortunately until now we have argument by Mr. Williams attacking Judge Murphy's decision and argument by you attacking Judge Murphy's decision. Nobody has supported Judge Murphy.

MR. ENKER: There is one problem with Judge Murphy's decision, your Honor, and that is that I think under the Kyle case, even under the Consolidated Laundries case, the standard to be applied to the question of prejudice would be a varying standard depending upon the nature of the wrongdoing by the Government counsel, assuming there to be some wrongdoing. If there were no wrongdoing, we don't reach the issue of prejudice.

Judge Murphy seemed to assume Government counsel committed wrong in not turning over the statements. He applied this very liberal standard of prejudice. I think that problem has to be decided by your Honors on the basis of your understanding of what the nature of the Government counsel's response to the request

fended Judge Murphy's result only by attacking his rulings that the Shaw notes were within the Jencks Act and should have been turned over to the trial judge (*id.* at 82-111; Gov. CA Br. 9-34). But in the event that the Shaw notes were held producible to the defense, counsel acknowledged that their withholding would

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was. If Government counsel committed a wrong, acted improperly, withholding something, suppressed something of any materiality, that would suffice and we would have no argument. Clearly there is a difference.

JUDGE WATERMAN: In other words, there is prejudice?

MR. ENKER: I am not saying there was prejudice unless Government counsel had done something improper; some improper act to warrant application of the very strict standard. The standard of Consolidated Laundries I don't think would be applicable to this case. Consolidated Laundries is a unique case. There is a maxim that hard cases make bad law. There were a lot of other issues in the case that are left undecided in the opinion and the opinion reserved on those grounds.

JUDGE WATERMAN: Do I understand you if Mr. Shaw's notes ought to have been turned over for an examination in camera by the trial judge and they were not, there was prejudice?

MR. ENKER: No. First of all, the preliminary question is should they have even been turned over to the judge.

JUDGE WATERMAN: So Judge Murphy was wrong all the way?

MR. ENKER: Yes.

JUDGE MARSHALL: Judge Murphy continued to be wrong but the result was wrong?

MR. ENKER: No, that is the only thing I agree with him on. . . ." Court reporter's transcript of oral argument at 120-22.

The cases referred to in the quoted passage are *United States* v. *Consolidated Laundries Corp.*, 291 F. 2d 563 (2d Cir. 1961) and *Kyle* v. *United States*, 297 F. 2d 507 (2d Cir. 1961).

be prejudicial if it had been due to the government's wrongdoing.

> "MR. ENKER: * * * Judge Murphy seemed to assume Government counsel committed wrong in not turning over the statements. . . . *If Government counsel committed a wrong,* acted improperly, withholding something, suppressed something of any materiality, that would suffice and we would have no argument. . . .
>
> JUDGE WATERMAN: In other words, there is prejudice?
>
> MR. ENKER: I am not saying there was prejudice *unless Government counsel had done something improper;* some improper act to warrant application of the very strict standard.[5] . . ." Court reporter's transcript of oral argument, at 120-21 (emphasis supplied).

In this Court, however, the government concedes both the producibility of the notes and the governmental impropriety in their non-production. Thus it accepts "Judge Murphy's findings that the Shaw notes should have been produced under 18 U.S.C. 3500." (Br. Opp. 36.) It further accepts, at least "for present purposes", that suppression of Shaw's notes was due to "wrongful or negligent non-production on the part of the government" (Br. Opp. 35; *compare* Pet. 11a, n. 3, 13a; 200 F. Supp. at 714). The concession at

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[5] The "very strict standard" to which counsel referred is the *Rosenberg* test of harmless error for Jencks violations, as stated by the court below in *Kyle* v. *United States*, 297 F. 2d 507, 514 (2d Cir. 1961). Counsel's reference to the "very liberal standard of prejudice" applied by Judge Murphy (n. 4, *supra*), means a standard which is liberal to the government, in contrast with the "very strict standard" which the government must meet under *Rosenberg*.

oral argument, that the prejudice ruling was unsupportable *if* the government had wrongfully withheld notes producible under §3500, should therefore be applied.

Nor is the government convincing in its attempt to mitigate the wrongfulness of the conduct involved. The Brief in Opposition, in conceding that the withholding of Shaw's notes is to be deemed wrongful "for present purposes", adds:

> "[I]t is only fair to the attorney involved[6] to point out that the instant trial was concluded in April 1959, before the decision of this Court in *Palermo* v. *United States*, 360 U.S. 343, at a time when the term 'substantially verbatim' was thought to mean the equivalent of a stenographic recording." (Br. Opp. 35.)

This explanation is untenable in light of the trial court's rulings on the definition of "substantially verbatim" statements. Judge Bicks expressly rejected the argument of the United States Attorney at trial that statements must be stenographic in nature in order to qualify as "substantially verbatim" (Tr. 2049-55). Rather, Judge Bicks ruled, a statement was producible under the Act if it "set forth in substance what the witness said" (200 F. Supp. at 714-15; Tr. 2021, 2031, 2032, 2046). It is apparent from a mere inspection of the excerpts from agents' reports held "substantially verbatim" by Judge Bicks at trial (R. 1a-16a) that such excerpts were not "the equivalent of a steno-

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[6] It is not clear to whom "the attorney involved" refers—Assistant United States Attorney Shaw, who had taken the notes, or the United States Attorney and other Assistants who represented the government at trial when the notes were withheld.

graphic recording" of Cantellops' statements; indeed they were far less stenographic in nature than most of Shaw's contemporaneous interview notes (1829a-1913a). The government's present explanation for withholding Shaw's notes is also at variance with its suggested explanation in the court of appeals (Gov. CA Br. 19-20): that government counsel had not turned over Shaw's notes to the trial judge because they did not consider notes taken by an Assistant United States Attorney within either the statute or the defense request for "any report or memorandum prepared by a Government agent" (G. App. 1a-2a). The claim that Assistant United States Attorneys are not "government agents" was rejected by the court of appeals as a "game of verbal jackstraws" (Pet. 7a).

Neither attempted explanation for withholding the notes has any support in the record. Nor was either explanation offered at the hearing in the district court where, unlike on appeal, the government was represented by two of the three counsel who had appeared for the government at trial (125a; Tr. 64a). At the district court hearing, government counsel did not even offer a representation as to the reason for the notes' non-production, let alone adduce evidence on the point. The reason for withholding of the notes being peculiarly within the government's knowledge, it had the burden of proof in explaining their non-production. See *Campbell* I, 365 U.S. 85, 96 (1961). In the instant case the government made no attempt to sustain its burden. *Compare United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563 (2d Cir. 1961): there too a motion for new trial was predicated upon newly discovered evidence of the government's failure to produce documents containing impeachment material, but the gov-

ernment assiduously (if unsuccessfully) attempted to prove that the non-production was not attributable to its fault.

Petitioner submits, in short, that the government's alternative ground for sustaining the judgment should not be entertained, since it was not advanced below, and also conflicts with the government's position in the court appeals.

> "Generally, at least, suitors may not maintain a position here which conflicts with that taken below. . . ." *State of Ohio ex rel. Seney* v. *Swift and Co.*, 260 U.S. 146, 149 (1922).

Compare Scott v. *Armstrong*, 146 U.S. 499, 512-13 (1892), where the Court reversed a judgment rather than sustain it upon a ground not passed upon below. See also *Abel* v. *United States*, 362 U.S. 217, 230 (1960), where the Court refused to pass upon a possible ground for reversal because petitioner's contention not only "was not made below; indeed, it was expressly disavowed." The same may be said of the respondent's contention here.

III THE GROUND UPON WHICH THE GOVERNMENT NOW SEEKS TO SUSTAIN THE JUDGMENT IS WITHOUT MERIT

The government's argument that the wrongful withholding of Shaw's notes did not prejudice the defense (Br. Opp. 36-46) considers first the 61 pages of notes which Judge Murphy held to correspond with the grand jury testimony, and then the 24 pages of notes dated October 10 and 11, 1957, which Judge Murphy did not find so to correspond. Petitioner will reply in the same order.

A. The 61 Pages of Notes

Petitioner, as previously noted, after securing from the court of appeals the right to inspect the 61 pages of notes (see Pet. 13, n. 10), demonstrated in his brief in the court of appeals 61 respects in which there were discrepancies between these notes and the grand jury testimony (Pet. CA Br. 65-95). Petitioner's brief also demonstrated the potential use of the discrepancies for impeachment purposes (*ibid.*). A copy of this brief was lodged with this Court upon the filing of the petition for certiorari, and nine additional copies are being lodged with this reply brief. The government in this Court, as in the court below, has not disputed the discrepancies asserted by the petitioner. Here, however, the government has set forth 35 instances in which it claims that both "the grand jury testimony and the notes indicated" certain specified events (Br. Opp. 37-41).

Even assuming the correctness of the government's 35 comparisons between the notes and the grand jury minutes, it would avail the government nought. Under *Rosenberg*, the test rests not upon the respects in which the documents are similar but the respects in which they differ. The harmless error doctrine cannot successfully be invoked by the government unless the grand jury minutes contained "the same information", "the very same information", as the withheld Shaw notes. *Rosenberg* v. *United States*, 360 U.S. 367, 370-71.[7] Since the government has not contested here or below petitioner's showing of 61 instances in which the defense did not receive "the same information" from

[7] The harmless error test is further discussed in Part III-C, *infra*.

the minutes that was contained in the withheld notes, the 35 alleged similarities between notes and minutes still could not render the notes' withholding harmless.

But the foregoing assumption, that the government's 35 comparisons between notes and minutes are valid, cannot withstand analysis. The invalidity is not primarily due to errors in what the government states as to the contents of the respective documents—although such errors exist. It is due primarily to what the government's statements of the record omit. In most instances the government's comparisons are couched in such general terms that, while not inaccurate in themselves, they cloak the differences which a more specific comparison would reveal.

Both types of flaw in the government's comparisons may be illustrated by examination of one of the instances in which the minutes and notes allegedly recite the same version of an incident:

> "... that Cantellops thereafter met in a hotel room with Ormento, Mazzie, Santora and the Mexican, and the decision was made for Cantellops to pick up the narcotics again in Miami (G.J. 137-39; compare H. App. 1892-1894, 1907-1909); ..." (Br. Opp. 40.)

The government reads the record inaccurately in contending that Santora and Mazzie were present in both versions. While the minutes do list Santora as present (G.J. 137), Santora's name is crossed out in the notes (1909a). On the other hand, the notes list Mazzie ("Rocco") as present (1909a), while the minutes do not (see G.J. 137). Nor does the government, in its apparent attempt to show symmetry, allude to the notes' mention of an additional participant in the meet-

ing, who is not mentioned in the minutes: Evola ("Joe") (*compare* 1909a *with* G.J. 137). The government's comparison correctly states the outcome of the meeting: "the decision was made for Cantellops to pick up the narcotics again in Miami". But the government ignores the differences between the versions as to how that outcome was achieved. According to the grand jury testimony, the decision to use Miami was made at the suggestion of Santora (G.J. 137). But the notes cannot say this, since they do not show Santora present; instead they attribute the same suggestion to Evola (1909a).

Another illustration of the government's use of a generalized comparison to conceal specific differences between the two versions of an incident, is its statement that both the grand jury minutes and notes indicated

> ". . . that Acevedo, who had sold narcotics for Cantellops, discussed narcotics with him in a bar (G.J. 16-18; compare H. App. 1865); . . ." (Br. Opp. 38-39.)

While it is true that such a discussion is mentioned in both versions, they differ markedly regarding its content. Thus, according to the notes, Cantellops talked with Acevedo "for a long time" in the Capo Bar on Friday, April 12, 1957 (1865a); but before the grand jury Cantellops denied having "a long conversation" about narcotics at that time (G.J. 17-18). According to the notes, Cantellops utilized the occasion to recruit the co-conspirator Acevedo into the conspiracy; Cantellops "Asked him [Acevedo] if he wanted to work for me" (1865a). But Cantellops told the grand jury, "I didn't ask him to work for me . . . He start by himself . . . [b]ecause he knew all the junkies before I knew

them." (G.J. 17.) The government's statement that Acevedo "*had* sold narcotics for Cantellops" prior to the talk in the bar accurately recites only the grand jury version; it conflicts with the version in the Shaw notes. The marked differences between the versions recorded in the notes and minutes exist notwithstanding that Shaw took the notes only four days prior to the grand jury testimony (see Br. Opp. 37; G.J. 1; 1853a). Shaw testified that he used his interview notes in examining Cantellops before the grand jury (1640a). It seems apparent, from comparison between the passages cited by the government, that before the grand jury Shaw was asking leading questions in an effort to have Cantellops repeat the story contained in the notes, but that Cantellops would not give the same answers on the second occasion. Such a shift in Cantellops' story over a period of four days would obviously have impeached his credibility at trial, where he claimed accurate recollection of dealings three and four years before.

A further example of the manner in which a general comparison fails to reveal a small but significant difference is the government's statement that the notes and minutes both indicated

> ". . . that Cantellops thereafter purchased narcotics regularly from Ralph Polizzano during 1956 (G.J. 7; compare H. App. 1859, 1861); . . ." (Br. Opp. 38.)

Although "regularly" may be a technically accurate adverb to describe the frequency of Cantellops' purchases in both versions, the minutes state that Cantellops "Often" purchased narcotics from Ralph Polizzano for the two or three months preceding September

11, 1956 (G.J. 7), while the notes are more precise. They specify that, from about July 30, 1956 until September, 1956, Cantellops would pick up one to three ounces of narcotics from Ralph Polizzano "every other day" (1861a). The greater precision found in the notes would have made them valuable to this petitioner for impeachment purposes. Most of Genovese's alleged conspiratorial activity was placed by Cantellops in August or the beginning of September, 1956 (see Pet. 9). The statement that Cantellops had seen Ralph Polizzano "every other day" during this period is utterly inconsistent with the frenetic schedule of activities, including trips to Miami and Puerto Rico, which Cantellops testified at trial that he had performed during August and early September of 1956 (Tr. 296a-362a).

A further example, particularly affecting this petitioner, of the government's deceptively general comparisons, is the one stating that both the minutes and the notes indicated

> ". . . that Cantellops, while in the company of Ormento and others,[8] had seen Genovese in a restaurant on the east side (G.J. 118; compare H. App. 1908); . . ." (Br. Opp. 40.)

This is the only one of the government's comparisons in which the petitioner Genovese is named. By placing the incident "in a restaurant on the east side", the government apparently overlooks that at trial the

[8] The generalization "and others" leaves unrevealed the discrepancy as to who the "others" were. According to the grand jury testimony, they were Santora, Mazzie ("Rocco") and the Mexican (G.J. 118). In the notes, however, Santora's name is crossed out and the name of Evola is added (1907a).

precise location of the restaurant presented a key issue as to the credibility of Cantellops' testimony against Genovese. The indictment and the bill of particulars had differed over the restaurant's location, the former describing it as "a bar at 96th Street, in New York City, New York", the latter as a "Bar and restaurant on south side of 86th St. between 2d & 3rd Avenues" (33a, 38a). The indictment version was obviously based on Cantellops' grand jury testimony describing the restaurant as "a restaurant in 96th, Italian[9] restaurant on the east side." (G.J. 118; see also G.J. 244.) At trial Cantellops testified in accordance with the bill of particulars' version of the restaurant's location (see Tr. 301a-02a, 336a-37a, 582a-88a). Cantellops claimed at trial that there had been a "mistake" in the street number, which he had corrected some months before. He testified that, since there was in fact no such restaurant on 96th Street, he must have mistakenly used the number 9 instead of 8 when he told the United States Attorney and the narcotics agents that the restaurant was on 96th (see Tr. 3424-32, Tr. 610a). The Shaw notes, unlike the minutes, would have refuted this explanation, as a result of the notes' greater specificity. The notes placed the restaurant not merely on East 96th Street (as the minutes did), but specifically "Between Park and 3d Avenue. Street has a slope towards 3d Avenue." (1908a.) This description of the topography, the defense could have shown—indeed a New York City jury would almost certainly have known—accurately describes 96th Street between Park and 3d Avenues, but is manifestly inapplicable to 86th Street between 2d and 3d, the location claimed in the bill of particulars and at trial. Cantellops' explanation that

[9] In the notes the restaurant is described as German (1908a).

he had merely made "an honest mistake in the number" of the street (Tr. 3424) would thus have been discredited; he would hardly have mistaken the 96th Street hill.

The limited space here available precludes the multiplication of examples of discrepancies, unrevealed by the government's comparisons, between the grand jury minutes and 61 pages of Shaw notes. For further examples of discrepancies, if these be deemed necessary at this juncture, the Court is respectfully referred to the detailed analysis contained in the lodged copies of the brief of this petitioner in the court of appeals (Pet. CA Br. 65-95).

Petitioner contends that the withholding of these notes cannot reasonably be deemed harmless error as to him. As shown in the petition, the evidence of petitioner's membership in the conspiracy consisted solely of Cantellops' uncorroborated testimony as to four occasions on which he had allegedly observed Genovese (Pet. 8-9). The above-cited description in the notes of the restaurant's location would have impeached Cantellops' testimony as to the third and fourth of these occasions. The third occasion took place in the restaurant itself (Tr. 302a-03a); the fourth followed a rendezvous which was arranged when Cantellops' party stopped at the same restaurant (Tr. 336a-37a). The testimony concerning the third occasion would have been further discredited by the discrepancy between the notes and trial testimony as to the immediately succeeding event. According to Cantellops' trial testimony, he and his party proceeded from the restaurant encounter with Genovese to a hotel room where the defendant Santora was waiting and a meeting then took place (Tr. 302a-03a). But, as pointed out above (p.

15), the notes contradict the minutes' claim that Santora was at the hotel. The testimony concerning the fourth occasion would have been further impeached by the notes' statement that Cantellops had seen Evola ("Joe") only three times: once in a hotel on 85th Street and twice in the park (1913a). At trial Cantellops testified that he had also seen Evola on the last of the occasions when he encountered Genovese, *i.e.*, en route to and at the meeting at defendant Mazzie's house in the Bronx (Tr. 336a, 343a, 351a). Cantellops even cited specific remarks which Evola allegedly made at the meeting (Tr. 347a, 349a). The credibility of the testimony placing Genovese at the meeting would hardly have survived a showing that Evola was not there.

The notes would also have detracted, as the grand jury minutes did not, from Cantellops' trial testimony as to the first two occasions on which he allegedly saw Genovese. On both occasions Genovese was allegedly with Carmine Polizzano (although Cantellops later admitted at the new trial hearing that one of the occasions did not occur; see Pet. 8-9). The incriminating character of these meetings for Genovese derived from Carmine Polizzano's alleged prior participation in the conspiracy. Cantellops' testimony involved Carmine Polizzano in the original formation of the conspiracy, by ascribing to him an active role in the conspirators' first two overt acts: the planning and execution of the Las Vegas narcotics delivery (see 30a-31a; Tr. 176a-77a, 183a-88a, 193a). The grand jury minutes likewise involved Carmine Polizzano in these events (see G.J. 32-38, 41-42). But the notes in no way involved Carmine Polizzano in the Las Vegas venture; the only co-conspirator whom they implicate in this venture is Barcelona (see 1868a-80a). The government, in recit-

ing instances in which these notes and the grand jury testimony as to the Las Vegas trip were similar, significantly mentions only Barcelona's activities (see Br. Opp. 39). It thus ignores the crucial distinction between the versions in the notes and in the minutes: that the former involved only Barcelona, while the latter added Carmine Polizzano and other alleged members of the conspiracy.

In short, the 61 pages of notes included information, not revealed by the government's comparisons, which besides discrediting Cantellops generally, would have directly or indirectly impeached all of his limited testimony against Genovese. Accordingly, the withholding of the notes was not harmless to petitioner, but plainly prejudicial.

B. The 24 Pages of Notes Dated October 10 and 11, 1957

In discussing the October 10 and 11 notes, the government again ignores the showing of numerous conflicts between the notes and trial testimony made in petitioner's brief below (Pet. CA Br. 37-59). Thus, for example, the ten-page discussion below of the many respects in which the October notes would impeach Cantellops' trial testimony concerning the Las Vegas trip (Pet. CA Br. 38-48) is not met by any attempt on the government's part to reconcile the notes with the trial testimony. Instead, the Brief in Opposition merely recites a few respects in which other materials on the Las Vegas trip assertedly contained the same version as the notes (Br. Opp. 43-44), and so presumably would render the notes without additional impeachment value. In order to fashion the comparison, however, the documents' contents are stated in terms so general that they would also apply to the very trial

testimony which the more specific statements in the notes impeach.[10]

With regard to the Las Vegas trip, the government also cites certain respects in which it concedes that the notes contained information not otherwise available to the defense (Br. Opp. 45). It claims that these represent "The only significant area of the notes which petitioners did not already possess in one form or another . . . ." (*Ibid.*) However, from a reading of the government's concession, the most fundamental difference between the notes and the other materials would hardly appear. That difference is that the story as recorded in the notes implicates none of the defendants or alleged co-conspirators (besides Cantellops himself). According to the October notes, the Las Vegas trip was made by Cantellops at the behest of one "Conrad De la Cruz", who is not named in the indictment. Delivery was made at the Las Vegas end to an unnamed person, without the assistance of any defendant. (1829a-33a.) Thus the entire basis of Cantellops' claim that he entered into a conspiracy with these defendants at the time of the Las Vegas trip in March of 1955 (see Tr. 165a-200a; *United States* v. *Aviles*, 274 F.2d 179, 182-83 (2d Cir.

[10] *E.g.*, the Brief in Opposition states that Cantellops "left the New York area on a flight to Los Angles" (Br. Opp. 43). "The New York area" is apparently meant to include both Newark and Idlewild, thus avoiding the conflict between the notes' statement that Cantellops left from Idlewild and the trial testimony that he left from Newark (*compare* 1830a and 1837a *with* Tr. 2378-80). Besides the notes, none of the materials cited in the government's comparison give Idlewild as the place of departure, while two of the cited reports give Newark (2059a, 2061a). The only materials furnished the defense at trial thus were consistent with Cantellops' version on the stand, while the withheld notes would have impeached it.

1960)), would be discredited by the October notes. The discrediting of the Las Vegas trip would also discredit the balance of Cantellops' story. For this was the only one of Cantellops' ten trips as to which there was any corroboration that he was present in the city claimed at the approximate date claimed (Tr. 5050-55; Gov. Exs. 53, 101, 102); and the United States Attorney in summation urged that this corroboration showed that the defense attack on the credibility of Cantellops' other testimony should be rejected (Tr. 6756, 6780-81).

The notes' omission of Carmine Polizzano's alleged role in the Las Vegas trip is of considerable importance to this petitioner. For, as noted above, the impeachment of Cantellops' trial testimony involving Carmine Polizzano in the conspiracy redounds to Genovese's benefit by undermining the significance of Genovese's alleged meetings with Carmine Polizzano—meetings which allegedly occurred on the first two of the four occasions that Cantellops saw Genovese (see Pet. 8-9). The notes' version of the Las Vegas trip would also assist this petitioner by contradicting Cantellops' testimony before the grand and petit juries, that he became involved in the trip and in the conspiracy through his efforts to borrow money to finance his invention of a crooked gambling device (G.J. 31-35; Tr. 165a-81a). The government claimed at trial that

> "[T]his gambling device . . . is a thread which runs through a great deal of this testimony . . . it was discussed with many of the defendants by this witness during the course of the conspiracy . . . ." (Tr. 166a-67a.)

Cantellops claimed that his introduction to "the Right Man" (allegedly Genovese) was promised by Gigante

as a result of Cantellops' telling Gigante that his gambling invention would be a better investment for the conspirators than narcotics (Tr. 292a). Thereafter, in Gigante's presence, when Cantellops allegedly was introduced to Genovese, he was told to explain his invention to Genovese and, when he did so, Genovese indicated that Cantellops could finance a sample of the invention through his activities in the narcotics conspiracy (Tr. 338a-40a). The impeachment of Cantellops' story of the gambling invention would thus have snipped the very thread by which he bound Genovese to the conspiracy.

Judge Murphy found that, "The October notes contained materially false versions of two of Cantellops' trips, one to Las Vegas and one to Miami . . . ." 200 F. Supp. at 716. The Brief in Opposition gives no basis for rejecting this finding as to either trip. With regard to the Miami trip—and in contrast to the concession regarding the Las Vegas trip that there was a "significant area of the notes which petitioners did not already possess" (Br. Opp. 45)—the government maintains that "Only insignificant details of the Miami trip were not in the other documents petitioners were given." (Br. Opp. 43.) But in the ensuing list of such "details", the government overlooks the most fundamental of the differences revealed by the notes alone.[11] The notes placed this trip to Miami and Tampa in the early part of March, 1957, following Cantellops' release from prison in February, 1957 (see 1834a, 1838a-44a). However, the trial testimony placed the Miami-Tampa trip in June of 1955 (see Tr. 205a, 206a-08a),

[11] An extensive discussion of the differences between the trial testimony and the October notes concerning the Miami-Tampa trip appears in Pet. CA Br. 52-57.

as did the grand jury testimony (see G.J. 45, 48, 51-52).[12] The question and answer statement taken by Shaw on October 10, 1957, which was given to the defense, significantly fails to specify the year of the Miami-Tampa trip (see 2051a).

The critical importance of placing the Miami-Tampa trip in March of 1957, instead of June of 1955, is that the former version impeaches Cantellops' trial testimony as to all the events in the intervening period. Cantellops' trial testimony places his trips and other conspiratorial activities in careful chronological sequence (ending with his arrest on July 1, 1957, Tr. 392a-93a), and the majority of these activities were subsequent to the Miami-Tampa trip. If that trip was not until March of 1957, then Cantellops' account of the activities placed during the two preceding years is discredited. This is of particular significance to the petitioner Genovese, since all of his alleged contacts with Cantellops were placed by the latter in 1956 (see Pet. 8-9).

In short, the government has not refuted, or even attempted to refute, petitioner's showing below (reiterated at Pet. 12) that the October notes contained material directly impeaching nine of the twenty-seven episodes to which Cantellops had testified at trial, partially impeaching three others, and indirectly impeach-

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[12] The government misreads the grand jury testimony when it cites "G.J. 183, 186" as stating "that Cantellops picked up narcotics in an old suitcase *in Tampa*" (Br. Opp. 42, emphasis supplied). The cited testimony relates to receiving luggage in Key West (G.J. 183) and at the Lido Hotel in Miami (G.J. 186). The trip which Cantellops was then discussing did not include Tampa at all (see G.J. 183-87). Moreover, Cantellops elsewhere told the grand jury that the Lido Hotel incident was not connected with the Tampa trip (G.J. 52).

ing the remainder by the fatal discrepancy as to the year of the Miami-Tampa trip. Nor has the government shown that the trial testimony concerning these episodes was equally impeached by the other materials which the government cites.[13] Had the October notes been available at trial, Cantellops' testimony concerning both this petitioner's connection with the alleged conspiracy, and the very formation and existence of such conspiracy, would have been seriously discredited.

C. The Legal Test of Harmless Error Under the Jencks Act

Where the erroneous ruling of a trial judge has deprived the defense of material producible under the Jencks Act, the test of harmless error applied by this Court is whether the defendant at trial received "the same information," "the very same information," that was contained in the withheld material. *Rosenberg* v. *United States*, 360 U.S. 367, 370-71 (1959). The *Rosenberg* test was followed and quoted with approval in *Killian* v. *United States*, 368 U.S. 231, 243-44 (1961). On the other hand, where the same information was not received by the defense, this Court has declined to permit speculation as to the extent of its impeaching effect.

> "Since the production of at least some of the statements withheld was a right of the defense, it is

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[13] The government seeks to minimize the impeaching effect of the October 1957 notes by citing grand jury testimony of June 25, 1958 (G.J. 232-33) in which Cantellops assertedly claimed that fear had prevented him from implicating Genovese and Gigante sooner (Br. Opp. 45-46). This argument has two flaws. First, Cantellops did not repeat the claim before the petit jury, and the grand jury testimony in question was not before them (see Tr. 2732-33). Second, such testimony did not name Genovese, who was not mentioned in any of Cantellops' testimony of June 25 (G.J. 230-41).

> not for us to speculate whether they could have been utilized effectively." *Clancy* v. *United States*, 365 U.S. 312, 316 (1961).

See also *Scales* v. *United States*, 367 U.S. 203, 258 (1961) ("Once this question [whether statements are producible under § 3500] has been determined, whether the statements may be useful for purposes of impeachment is a decision which rests, of course, with the defendant himself").

The government plainly has not demonstrated that petitioner received "the very same information" in other materials that was contained in Cantellops' statements to Shaw. Even accepting its argument at face value, the government has claimed with regard to the 61 pages of notes only that "*Almost* their entire substance was contained in Cantellops' . . . grand jury testimony" (Br. Opp. 37, emphasis supplied). With regard to the October 1957 notes, it has acknowledged in regard to the Las Vegas trip that there is a "significant area of the notes which petitioners did not already possess in one form or another" (Br. Opp. 45). In addition, what the government styles "Only insignificant details of the Miami trip" concededly "were not in the other documents petitioners were given." (Br. Opp. 43.) Thus, even without considering petitioner's analysis of the record in Parts III-A and III-B, *supra*, it is plain from the government's own reading of the record that it is asking this Court to indulge in the very speculation held impermissible in *Clancy*, *supra*.

Judge Murphy's ruling, that withholding of the October notes was non-prejudicial, likewise rests not upon "the same information" test of *Rosenberg*, but on the

speculation prohibited by *Clancy*. The government does not appear to contend that Judge Murphy found complete correspondence between the October notes and other materials furnished to the defense. Rather, the government's description of his holding is that,

> "As to the notes of October 10 and 11, he concluded that denial of access *did not influence the result*." (Br. Opp. 37, emphasis supplied.)

This outcome-determinative test is a fundamental departure from the *Rosenberg* standard, and plainly contrary to *Clancy*. It is in conflict with the basic principle of the *Jencks* case, that the defense rather than the court must assess the effect of confronting a witness with his prior statement. In *Jencks* the majority rejected the view of the concurring opinion, that the case should be remanded for the district judge's consideration of whether denial of the statements affected the verdict. See *Jencks* v. *United States*, 353 U.S. 657, 678 (1957) (concurring opinion).

In ruling on the 61 pages of non-October notes, Judge Murphy apparently accepted the *Rosenberg* test. See 200 F. Supp. at 715. But, since the defense had not as yet been permitted to see the notes, Judge Murphy was not apprised of the significant respects in which these differed both from the grand jury and trial testimony (see Pet. CA Br. 65-95). His opinion mentions no differences at all. The inadequacy of Judge Murphy's ruling in this respect is inherent in the very rationale of the *Jencks* case itself:

> "Because only the defense is adequately equipped to determine the effective use [of statements] for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the

defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less." *Jencks* v. *United States, supra,* at 668-69.

Finally, the government seems to imply that it is entitled to a more favorable standard of harmless error because the non-production of the notes first came to light upon a new trial motion (see Br. Opp. 34). But the government's suggestion is paradoxical. It would allow the government to receive a more favorable standard of review because the withholding of the notes was not, as in *Rosenberg,* due to an erroneous ruling of the trial judge, but was due instead to wrongful action on the government's part at trial. If, as petitioner contends, denial of the Shaw notes would not have been held harmless error under the *Rosenberg* standard on direct appeal,[14] the error is hardly rendered harmless by the government's suppression of the notes until Shaw testified on the new trial motion, or by petitioner's intervening years of imprisonment under the judgment obtained at trial.

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[14] If anything, the standard should be stricter than in *Rosenberg* when, as here, the withheld Jencks statements would impeach the sole witness against petitioner. In *Rosenberg,* by contrast, the statement erroneously denied was not that of the principal witness, but of a witness whose testimony did not even mention the accused. See 360 U.S. at 373-74 (dissenting opinion). Defense counsel had even stated to the jury that he did not question the accuracy of that witness' testimony, a point which the government stressed in this Court. See Brief for the United States, pp. 65-67, *Rosenberg* v. *United States, supra.*

Moreover, as the court below has observed, the government should be subject to a stricter test of harmless error where the deprivation of impeaching material is due to misconduct of the prosecution. See *Kyle* v. *United States,* 297 F.2d 507, 512-15 (2d Cir 1961).

IV. A NEW TRIAL IS REQUIRED UNDER BRADY V. MARYLAND

The Brief in Opposition does not even discuss the constitutional issue arising under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and presented by the fourth of the questions in the petition. Yet the applicability of *Brady* would undermine the government's entire argument on harmless error, for it requires a new trial as a matter of due process where the government has suppressed any requested [15] favorable evidence on any material issue. Even the government does not appear to contend that the Shaw notes did not contain information "favorable to" petitioner which the jury might have considered on a "material" issue. On the contrary, the government expressly acknowledges that one "area of the notes" was "significant" (Br. Opp. 45). Moreover, the government has conceded "for present purposes" that its withholding of the notes must be treated as "wrongful or negligent" (Br. Opp. 35). The case thus is brought squarely within the *Brady* holding:

> "[T]hat the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963).

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[15] In the instant case, the government's contention that the defendants had not requested the Shaw materials which were suppressed was rejected by the court below as a "game of verbal jackstraws" (Pet. 7a).

V. DESTRUCTION OF GOVERNMENT AGENTS' INTERVIEW NOTES PREJUDICED PETITIONER

The Brief in Opposition does not gainsay that the destruction of notes issue—previously left open by this Court in the *Campbell* cases [16]—is an issue of general importance. Rather, the government suggests that it should not be reviewed in this case (where it is presented by the fifth question in the petition), because the destruction assertedly did not deprive the defendants of impeachment material. The government's contention is that the notes which were destroyed were embodied in reports received by the defense (Br. Opp. 48). But the record does not support this contention.

A. Agent Consoli's Notes

The short answer to the government's contention that the reports received by the defense "contained lengthier and more detailed recitals of everything contained in the notes" of agent Consoli (Br. Opp. 46), is that the defense received only those portions of the Consoli reports which the trial court found to contain "substantially verbatim" statements of Cantellops (Tr. 2030-39). Such statements qualified for production under *subsection (e)(2)* of § 3500. But Consoli testified at the new trial hearing that it was his practice to read portions of the interview notes back to Cantellops to make sure that they were accurate (872a-73a; see also 860a, 865a, Br. Opp. 28). The interview notes thus approved by Cantellops would qualify under *subsection (e)(1)*, as interpreted in the second *Campbell* case, 373 487, 492 (1963). The destruction of Consoli's notes therefore denied to the defense statements of the wit-

[16] *Campbell* v. *United States* (*Campbell I*), 365 U.S. 85, 98 (1961); *Campbell* v. *United States*, 373 U.S. 487, 491 (1963).

ness producible under subsection (e)(1), even if it be assumed that Consoli's reports had included all statements in the notes which qualified under subsection (e)(2).

B. Agent Muglia's Notes

The government similarly contends that the defense received at trial "The reports which were prepared from the notes" of agent Muglia (Br. Opp. 46). In summarizing the testimony to support this conclusion, the government states:

> "Agent Muglia testified that he interviewed Cantellops on *two* occasions, and that he took notes of those interviews, recording the highlights of the pertinent data obtained from Cantellops (H. App. 1357-1359)." (Br. Opp. 29; emphasis supplied.)

The government further states:

> "Muglia prepared *reports of these interviews,* and the reports reflected the notes (H. App. 1358, 1359, 1360-1361, 1362, 1383)." (*Ibid.;* emphasis supplied.)

The significant point overlooked by the government is that at trial one of these two interview reports was denied to the defense, because Muglia then testified that he did not receive the information in that report from Cantellops (Tr. 2044). Assuming the hearing testimony cited by the Brief in Opposition to be truthful, Muglia must have testified erroneously at the trial in denying that the second report contained information which he had received from Cantellops. As a result of the pre-trial destruction of Muglia's interview notes, the defense thus was deprived not only of the Jencks statements contained in the notes, but also of the opportunity of showing that the second report was based

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on interview notes and thus itself producible insofar as it qualified under § 3500 (e)(2).

C. Agent Rowan's Notes

The government ignores the question raised by the petition (Pet. 42-43) as to whether the government had the burden of proving that the destruction of agent Rowan's notes was in good faith. Apparently the government considers that the issue need not be reached because of its contention that Rowan's notes, like the other agents', were embodied in reports, portions of which were turned over to the defense (see Br. Opp. 48). But it is apparent from a mere examination of the four brief excerpts which the defense received from Rowan's reports, containing a total of 10 sentences (R. 13a-16a), that these cannot plausibly have included most or all of the contents of those Rowan interview notes which Shaw conceded having in his possession (see Pet. 41 and n. 27).[17]

Nor can the government claim that Rowan would have had no more notes than the other agents because they were "similarly situated" (Br. Opp. 48). For both Shaw and Rowan's superiors in the Narcotics Bureau testified that Rowan had the most extensive role of all the agents working on the case (see 1492a, 1499a-1501a, 1580a, 1627a). A month prior to return of the indictment, warrants of arrest were issued for 32 of the 37 defendants solely on the basis of sworn complaints by Rowan, in which he stated that the source of his information was "investigations made by him in the course

[17] Moreover, Shaw saw only those notes which Rowan took before Shaw was relieved from the case about April, 1957. Rowan continued on the case through the return of the indictment in July, 1957.

of his official duties." (Record on appeal, pp. 7724-7872; *cf.* Tr. 926a-27a.) It is inconceivable that such investigations yielded notes no more extensive than the 10 sentences from reports received by the defense.

Rowan's destruction of his notes, without incorporating their contents in his reports, was highly prejudicial to petitioner. *E.g.*, Genovese was first implicated by Cantellops only as the result of Rowan's investigation revealing a fatal discrepancy in one aspect of Cantellops' story (1249a-66a, 1510a-11a). Rowan destroyed his notes on this matter (1249a), and it was not mentioned in any of the four reports received by the defense (R. 13a-16a). Again, petitioner was prejudiced by the absence from Rowan's notes of Cantellops' attempted identification of the various places involved in the testimony concerning Genovese, including the east side restaurant discussed above. Cantellops testified that Rowan was the only narcotics agent who accompanied him when the identifications were made (Tr. 592-93a, 609a, 764-65a). But there was a critical conflict between Cantellops' testimony that he had given Rowan definite identifications of the places in question and the representation by the United States attorney that it was not possible to specify precise locations in the bill of particulars because Cantellops had made no positive identification (Tr. 817a-26a). The conflict remained unresolved, because the United States Attorney advised the court that agent Rowan was unavailable and that there was no written report of Rowan on the matter (Tr. 590a-91a).

VI. SHAW'S NOTES ARE RELEVANT TO THE REMAINING GROUNDS OF THE NEW TRIAL MOTION

The government takes note of the contention raised in the sixth question of the petition, that Shaw's notes should be considered on remand as further evidence on the other grounds of the new trial motion (Br. Opp. 33, n. 21). However, the government thereafter refrains from discussing the relation of the notes to the other grounds of the motion.

Now that the government has conceded the qualification of the notes under § 3500 (Br. Opp. 36), they plainly should be admissible on remand to support petitioner's case on the other grounds. *E.g.*, one item in Shaw's notes would do much to refute Cantellops' testimony at the new trial hearing—accepted by Judge Bicks on the then existing record—that the material in the recantations to Siegal was the product of Siegal's suggestion, not of Cantellops' own knowledge (see 183a-214a; 197 F. Supp. at 543; Br. Opp. 10-11). The Shaw notes, unlike the grand jury or trial testimony, mentioned that at the time of Cantellops' second visit to the "Mexican's" hotel room on 85th Street, the "Mexican's" wife was no longer there but was living at the "Colonial Hotel" (1909a; see also 1893a). In the July 20 recantation to Siegal, Cantellops stated that in his trial testimony he had fabricated meetings in a park by the Planetarium, adjacent to 81st Street and Columbus Avenue; he told Siegal that he fabricated the meetings because he used to see the "Mexican" in that park when the latter came there to see if he could make up with his wife, who had moved from the "Mexican's" hotel to a hotel facing this park (see 1939a, 437a; Tr. 310a-19a, 331a-32a). The Manhattan telephone directory lists the address of the "Colonial Hotel" as 51

West 81st Street, *i.e.*, at 81st Street and Columbus Avenue facing the park described by Cantellops. Shaw's notes thus corroborate the recantation, and show that Cantellops rather than Siegal was its author. For Siegal could have learned only from Cantellops the information in the then unrevealed Shaw notes, that the "Mexican's" wife had moved to the Colonial Hotel.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted; it is further submitted that the judgment should be reversed summarily and the case remanded for a new trial.

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